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CIS

INVESTIGATION OF
SENATOR DAVID F. DURENBERGER

SELECT COMMITTEE ON ETHICS

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION



JULY 1990

Memoranda Submitted on Behalf of Senator David F. Durenberger

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(III)

MEMORANDUM TO SENATE SELECT COMMITTEE ON ETHICS
RE: STATEMENT OF POSSIBLE VIOLATIONS CONCERNING
SENATOR DAVID F. DURENBERGER AND POSSIBLE
RESOLUTION OF THESE MATTERS

MAY 16, 1990

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May 16, 1990

CONFIDENTIAL

Memorandum To Senate Select Committee On
Ethics Re: Statement of Possible Violations
Concerning Senator David F. Durenberger and
Possible Resolution of These Matters

This memorandum presents the perspective of Senator Durenberger's counsel on the evidence gathered by Special Counsel. It also provides our views as to why censure is not an appropriate sanction and why this matter should be resolved without a hearing that undoubtedly would be lengthy, costly, diverting and burdensome for all concerned.¹

This document does not purport to be a comprehensive review of all the evidence gathered by Special Counsel. Rather it presents our overall analysis of the evidence available to us to date, which of course is substantial. We hope to demonstrate that, while a substantial sanction such as a strong reprimand may be appropriate, the Draconian sanction of censure is not. In the most important matters, Senator Durenberger acted only after receiving copious legal advice and, in one instance, a Federal Election Commission Advisory Opinion. He and his staff also sought advice from

¹ A lengthy hearing would be particularly agonizing and expensive for Senator Durenberger who has already incurred substantial legal expenses.

the Rules Committee and this Committee. In retrospect, his conduct may have been flawed, but not intentionally so. We respectfully submit that, unless there is clear and convincing evidence of an intentional violation of law or Senate rule, censure is unwarranted. A strong reprimand may be appropriate, but not censure.

We deal below separately with each possible violation, stating it before proceeding to our analysis. We also provide the Committee with some observations about Senator Durenberger's personal and professional circumstances, the strains and pressures he was under, and the effect of these strains on his judgment and the decisions he made. Finally, we review recent disciplinary cases in both the Senate and House that the Committee may find pertinent.

PIRANHA PRESS

Whether [Senator Durenberger] may have violated 2 U.S.C. §31-1 and 2 U.S.C. §441i through an arrangement with [his] publisher, Piranha Press, pursuant to which [he] made approximately 113 appearances and/or speeches during 1985 and 1986 before various businesses, associations and other organizations, each of which was charged a fee for [his] appearance, and in exchange for which [he] received \$100,000 from Piranha Press.

Senator Durenberger's arrangement with Piranha Press is best examined by focusing, first, on the creation of the Author-Publisher Agreement and the Federal Election Commission Advisory Opinion relating to it and, second, on

the implementation of the Agreement. We believe that the evidence shows (1) that the FEC opinion was properly obtained, (2) that the Senator and others acted in good faith in implementing the Agreement and did not intend to do anything unlawful, and (3) that it is not at all certain that the actions were unlawful.

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The Piranha Press arrangement evolved after Senator Durenberger's first book, Neither Madmen Nor Messiahs, was published. The Senator wanted to publish other books and find a legal and ethical way to earn additional income in connection with his books. See Special Counsel's Exhibits (hereinafter "S.C. Ex.") 212, 213. He requested advice on the issue from his personal attorney, Michael Mahoney. Id.

After researching the issue, Mahoney's partner, Donna Hanbery, concluded that payment made for continuing services constituted a stipend under FEC regulations and that stipends were not subject to the limitations on honorarium income. Together with an attorney representing Piranha Press, she drafted the Author-Publisher Agreement, which provides that Senator Durenberger would make appearances over a two-year period to "discuss, speak on, or

otherwise promote" Neither Madmen Nor Messiahs in consideration for payment of a fixed sum in quarterly installments by Piranha Press.

Subsequently, Mahoney twice advised Senator Durenberger in writing that the proposed agreement would pass muster under the FEC regulations. See Attachment 1. Mahoney based his opinion on the definition of "stipend" set forth in 11 C.F.R. §110.12(c)(3) and on FEC Advisory Opinions to Senators Patrick Moynihan and William Proxmire and Congresswoman Barbara Jordan.² Id. In an October 1, 1984 letter to Senator Durenberger, Mahoney stated:

We are of the opinion that payments to be made to you under the Agreement for appearances satisfy the test of being payments for services on a fixed and continuing basis and thus constitute a stipend rather than an honorarium.

Id.

² The Jordan opinion noted that, for an honorarium to exist,

...money must be accepted as a payment for a single event or transaction and under circumstances which do not imply a continuing compensatory relationship between the parties for similar services. On the other hand, an officer or employee of the Federal government is considered to accept a "stipend" . . . if the money is accepted in the form of fixed or regular compensation intended as consideration for the rendering of services, e.g., a salary.

Advisory Opinion 1975-46, reported in Federal Election Campaign Financing Guide (CCH) ¶5153 (emphasis added).

Mr. Mahoney also suggested that, to be certain of this, Senator Durenberger should obtain an Advisory Opinion from the FEC. Id. Senator Durenberger instructed Mahoney to do so.

Mr. Mahoney and Ms. Hanbery submitted the request for an Advisory Opinion on October 19, 1984. See Attachment 2. The letter referenced the Author-Publisher Agreement, which indicated that a sponsoring group would pay Piranha Press a fee for the Senator's appearance. The letter asked the FEC to advise "if further information is needed." Id.

The FEC acknowledged receipt of the request by letter to Mr. Mahoney and Ms. Hanbery dated October 25, 1984. See Attachment 3. The letter stated that they would be contacted if additional information was needed. Id. Pursuant to 11 C.F.R. §112.1(f), the FEC General Counsel is required to review requests for Advisory Opinions and to notify the requesting person of any deficiencies in the request. The FEC never requested additional information from the Senator's lawyers.

On December 6, 1984, the FEC responded to Mr. Mahoney and Ms. Hanbery. The FEC concluded that

the arrangement ... whereby the Publisher will pay Senator Durenberger in quarterly installments over a two-year period for promotional appearances, creates a stipendiary relationship. Accordingly, payments made to Senator Durenberger under this agreement would not be viewed as honoraria and

therefore would not be subject to limitation under 2 U.S.C. §441i.

FEC Advisory Opinion 1984-56, reported in Federal Election Campaign Financing Guide (CCH) ¶5798. See Attachment 4.

It is difficult to fault the manner in which the FEC opinion was obtained. The Senator's lawyers concluded that an Advisory Opinion would be useful, provided the FEC with the facts they thought necessary, and offered to provide additional information if the Commission so requested, which it did not. Any claim that the Senator's lawyers duped the FEC is unsupportable.

Moreover, the record shows that Senator Durenberger in 1984, and his chief aide, Doug Kelley, in 1986, consulted staff members of this Committee about the propriety of the Piranha arrangement. See S.C. Ex. 6 and Attachment 5. This, then, was not a matter that was pursued without caution. Rather, Senator Durenberger sought advice not only from his lawyer, but also from two governmental bodies.

On May 21, 1986, an article appeared in the St. Paul Pioneer Press Dispatch suggesting that Senator Durenberger's arrangement with Piranha Press was designed to indirectly circumvent the Senate's limitations on honorarium income. The article reported that the request for the advisory opinion did not disclose the amounts sponsors paid

Piranha for the Senator's appearances or that the appearances amounted to "paid speaking engagements." See

Attachment 6. In addition, the article stated

Told of the nature of the promotions, FEC assistant press-officer Sharon Snyder said, "I don't think that changes the fact that he is getting a stipend (a fixed amount) and not an honorarium.... He is performing services for the company and has a contract with the publisher."

Id. Despite all the publicity that has attended this matter, the FEC has never instigated an inquiry or withdrawn its advisory opinion.

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The Committee apparently is concerned about the manner in which the Piranha arrangement was implemented.

These concerns seem to center around two factors:

(1) that requests for honoraria appearances made to the Senator's office were forwarded to Mr. Mahoney, who also acted as Piranha's agent, and that the appearances thereafter became appearances for which Piranha was paid a fee.

(2) that the Piranha appearances were in most respects not book promotions, but were indistinguishable from typical honorarium appearances.

Special Counsel's evidence, in turn, raises two questions:

(1) Does the manner in which the Piranha arrangement was implemented show that Senator Durenberger and others conspired or intended to circumvent the honorarium limitations in an unlawful fashion?

(2) Was the Senator's conduct actually unlawful in some way?

In our view, the evidence does not support the conclusion that there was a widespread conspiracy formed with the intent of allowing the Senator illegally to circumvent the honorarium limitations. This theory would require the complicity of Senator Durenberger, his attorneys, Michael Mahoney and Donna Hanbery, his publisher, Gary Diamond, his staff members, Tom Horner, Anne Kelly Planning, Jodi Mathison Hackett, Chip Kahn and Doug Kelley, and others.

A better way to view the evidence is to conclude that Senator Durenberger and others, relying on the advice and conduct of Michael Mahoney, believed that the manner in which the Piranha arrangement was implemented was fully consistent with the law and the FEC advisory opinion. This view of the evidence is supported by the fact that there was no attempt to hide what was transpiring and the fact that Mr. Mahoney, whose firm drafted the Piranha Agreement and the request for the FEC opinion, acted as Piranha's agent in communicating with the sponsoring organizations.

Mr. Mahoney was aware from the outset that requests made to the Senator's office for honorarium appearances were being converted into Piranha appearances and that the requesting organizations had not invited the Senator to speak to promote his books and his publisher.

Indeed, he was actively involved in negotiating the arrangements for the appearances with the sponsoring organizations. At no time did he advise Senator Durenberger that the referrals to Piranha were somehow improper.

A significant early document is a February 15, 1985 letter from Tom Horner, the Senator's Administrative Assistant, to Mr. Mahoney. In this letter, Mr. Horner states

At the direction of Senator Durenberger I am forwarding to you the upcoming invitations that have been accepted on his behalf. These invitations were accepted prior to the agreement between the Senator and his publisher.... Each invitation is marked with the date of the event and the honoraria....

In accordance with the contract between the Senator and his publisher, it is my understanding that Curtin, Mahoney & Cairns, acting as agent of the publisher, will negotiate the fee, collect the fee and arrange payment by the publisher to the Senator.

S.C. Ex. 216. During his deposition, Mr. Horner testified that he specifically asked Mr. Mahoney whether it was appropriate and within the coverage of the FEC advisory opinion to refer requests for honorarium appearances that came into the Senator's office to Piranha. Mr. Mahoney, Mr. Horner testified, assured him that it was. See Personal Interview/Deposition of Thomas Horner, April 27, 1989, at 49. Thus, it is clear that the Senator and his staff viewed this conduct as appropriate from the very beginning.

It is, moreover, not at all clear that this conduct was in some way unlawful. We know of no law, FEC regulation, Senate rule, FEC advisory opinion, or interpretative ruling by this Committee indicating that a request for an honorarium appearance could not be transformed into an appearance that was part of a legitimate stipendiary relationship. At the most, there is uncertainty about this issue. It is significant in this regard that those requesting an honorarium appearance were free not to do business with Piranha. Indeed, several organizations withdrew their invitations to Senator Durenberger after they were contacted by Piranha. See S.C. Ex. 14, 18, 45, 47.

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Special Counsel's evidence shows that Senator Durenberger's appearances for Piranha were not typical book promotions. However, it is not clear exactly what shape an appearance should have taken to be a promotional appearance under the Piranha contract. Senator Durenberger has said that he believed he was promoting his books and publisher by speaking well to his audiences. He also made some specific (albeit limited) efforts to promote his book.³ See, e.g.,

³ The Senator discussed his promotional efforts -- and the dearth of instructions to him in this regard -- when he appeared before this Committee on February 8, 1990.

S.C. Ex. 55, 77, 87, 102, 139, 149, 153, 161. However, it is evident that neither Mr. Mahoney nor Piranha established guidelines to ensure that the Senator engaged in specific promotional activities or criticized him for his efforts.

During the contract's implementation, Mr. Mahoney acted both as Senator Durenberger's attorney and as Piranha's agent to ensure that the arrangement was properly administered. Special Counsel's evidence shows that, when sponsors objected to Messrs. Mahoney or Diamond about the promotional nature of the appearances, they did not insist on this. See, e.g., S.C. Ex. 36, 66, 114, 157, 181. Moreover, even though Piranha informed the sponsoring organizations by letter that they were required to make space available for the display and sale of the Senator's books and that promotional materials would be sent to them, Piranha almost never provided books or promotional materials to the organizations. See S.C. Ex. 13, 16, 19, 40, 48, 49, 58, 60.

In these circumstances, it is understandable why Senator Durenberger did not make more efforts to promote his books. The circumstances also explain why Senator Durenberger did not conclude that he was violating the honorarium limits because his appearances were not traditional book promotions. Indeed, it does not appear that, as a matter of the law, Piranha's payments to him became

honoraria, and not a stipend, because his appearances were not typical book promotions.

FEC rules and opinions provide that a payment to a Member of Congress "for services on a continuing basis" is a stipend not subject to the honorarium limitations. 11 C.F.R. §110.12(c)(3); FEC Advisory Opinions 1975-46, 1980-76, 1985-4, reported in Federal Election Campaign Financing Guide (CCH) ¶¶5153, 5583, 5825. This rule pertains whether or not a payment has been designated a stipend by the FEC in an advisory opinion. Thus Senator Durenberger could receive a stipend from his publisher for continuing services that would not affect his honorarium limits whether or not he received an advisory opinion from the FEC. The continuing services could have been something other than promotional appearances. They could have involved, for example, inspirational messages or remarks on various political subjects, such as Senators Simpson and Kennedy deliver during their frequent radio appearances.

Senator Durenberger obtained an advisory opinion relating to promotional appearances, but that does not mean he could not perform other continuing services for his publisher for stipendiary payments that would not count against his honorarium limitations. If Senator Durenberger went beyond the conduct described in the request for the advisory opinion, he did not necessarily violate the rule.

However, he no longer could avail himself of the safe harbor protection that pertains if the course of conduct described in the advisory opinion is followed. See, 11 C.F.R. §112.5; 2 U.S.C. §437f(c).

Gary Diamond did not insist that the Senator's appearances be more promotional than they were. In other words, Senator Durenberger performed the continuing services Mr. Diamond wanted. The continuing services might not have been precisely what the FEC opinion contemplated, but they were continuing services just the same. Thus, the payments should still be considered a stipend.

Under this analysis, the critical fact concerning whether the rule was violated is not whether Senator Durenberger's conduct conformed to that described in the advisory opinion or whether his speeches were promotional. The critical fact is whether he was paid for continuing services, which he clearly was. Consequently, the evidence gathered by the Special Counsel indicating that the speeches were not promotional does not require a finding that the rule was violated.

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Even if the Committee concludes that Senator Durenberger exceeded the limitations on honorarium income set forth in 2 U.S.C. §31-1 by accepting the income from Piranha Press, there is no basis for concluding that he

violated 2 U.S.C. §441i, as is charged. Section 441i provides that

No person while an elected or appointed officer or employee of any branch of the Federal Government shall accept any honorarium of more than \$2000 (excluding amounts accepted for actual travel and subsistence expenses for such person and his spouse or an aide to such person, and excluding amounts paid or incurred for any agents' fees or commissions) for any appearance, speech or article.

We know of no evidence that Senator Durenberger (as opposed to Piranha) retained more than \$2000 for any Piranha speech or appearance.⁴ Because the statute expressly excludes from the calculation of an honorarium amount any fees or commissions paid to third parties, it would be improper to attribute to Senator Durenberger the portions of the appearance fees retained by Piranha.

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The above discussion shows, we believe, that Senator Durenberger had no intent to circumvent the honorarium limitations in an unlawful fashion. Certainly, Special Counsel's evidence does not clearly and convincingly demonstrate such an intent. This discussion also shows that it is questionable whether his conduct did in fact result in an unlawful circumvention of those rules. In these

⁴ A \$100,000 payment for 113 speeches works out to less than \$1000 per appearance.

circumstances -- and particularly where the Senator sought advice from his lawyers, the FEC, and this Committee -- we believe this Committee, and the full Senate also, should find it difficult to conclude that censure is the appropriate remedy.

CONDOMINIUM ISSUES

Whether [Senator Durenberger] may have abused [his] United States Senate Office, and misused United States Senate funds through a pattern of improper conduct which brings discredit upon the United States Senate. Such conduct may have included the submission of misleading travel reimbursement vouchers to the Senate Disbursing Office; the misrepresentation of the ownership of the property for which [he] claimed lodging reimbursement from the United States Senate; and the backdating of the "Durenberger-Scherer" partnership, the transfer of the condominium property to that partnership, and the purported sale of the condominium to the Independent Service Company, and documentation relating to those transactions.

The condominium matter is complex and confusing. However, the basic facts show that, whether or not Senate reimbursement rules were violated, Senator Durenberger -- seeking legal advice at every turn -- sought to deal with condominium matters in a proper fashion. Virtually nothing was done without the participation of lawyers.

In the spring of 1983, Senator Durenberger owned two homes -- one in Minnesota, the other in the Washington area. To help alleviate financial pressures, his best friend and 1982 campaign manager, Gene Holderness, advised

him to sell his Minneapolis condominium, invest the proceeds, and seek reimbursements for rental payments. Senator Durenberger consulted Randy Johnson, the attorney for his campaign committee, about the reimbursement issue. Mr. Johnson advised Senator Durenberger that he could receive Senate per diem reimbursement for official business stays if he disposed of his LaSalle Street, Minneapolis condominium, moved his legal and voting residence outside of the Twin Cities area, and then rented the condominium. This advice is generally reflected in his June 28, 1983 letter to the Senator. See S.C. Ex. 262.

Roger Scherer, a long-time friend, approached Senator Durenberger and proposed to put the Senator's LaSalle Street condominium (no. 603), and one in the same building he owned (no. 703) into a joint business venture between them. The two agreed to such an arrangement in July, 1983. Senator Durenberger thereafter rented 603 from the joint venture. The arrangement with Mr. Scherer provided tax advantages to Senator Durenberger and provided Mr. Scherer with a steady source of income, something that the spasmodic rental of no. 703 had not accomplished.

While the basic agreement for a joint business venture was reached in July, 1983, the details were left to the Senator's lawyers. Mr. Johnson originally thought a property swap would be an appropriate vehicle. He even

prepared documents to effectuate this.

Dick Langlais, Senator Durenberger's then-tax lawyer, believed a swap would not work from a tax standpoint and recommended a partnership to ensure more favorable tax treatment. In late 1983, he and another lawyer in his office, Richard Lattimore, drafted a partnership agreement that by its terms memorialized the arrangement reached in July 1983.

When the partnership agreement had not been finalized by late 1983, Mr. Johnson wrote Senator Durenberger, urging that this be done and that the agreement be dated before August 1, 1983, to reflect the oral agreement reached with Mr. Scherer.⁵ See Attachment 7. He also concluded that Senate reimbursement for rents paid the partnership would be appropriate:

It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the partnership transaction and the allocations proposed by Dick Langlais, but he is your income tax specialist. In any event, from the standpoint of Senate Rules and IRS Regulations, I believe you can claim the per diem reimbursement -- but the paperwork on this should be completed immediately if you have

⁵ This letter was written after discussions with Tom Horner, who had just become the Senator's chief of staff.

not done so already. Everything should be dated before August 1st, reflecting the oral agreement between you and Roger.

In late December 1983, Michael Mahoney was given the task of handling the partnership transaction -- and other aspects of the Senator's affairs as well. He and David Steingart of his office finalized the partnership agreement, which contained the following clauses:⁶

WHEREAS, the parties entered into an oral agreement on or about the 28th day of July, 1983, regarding the leasing of 603 and 703; and

WHEREAS, pursuant to said oral agreement, a partnership was formed and began business on July 28, 1983; and

WHEREAS, said oral partnership agreement was not definitive of all rights and obligations of the parties; and

WHEREAS, the parties agreed that the then existing oral partnership agreement be amended to provide further definition of the rights and obligations of the parties and be reduced to writing....

S.C. Ex. 272.

After the document was signed by Senator Durenberger and Mr. Scherer (and their wives), Mr. Steingart sent it in February 1984 to Randy Johnson for review. Mr. Johnson, who is a notary, reviewed the agreement and notarized the signatures of Senator Durenberger and the

⁶ The Langlais/Lattimore draft contained similar language.

others on various documents, including quitclaim deeds, although they had not signed in his presence. (Johnson, however, was familiar with the Senator's and Mr. Scherer's signatures.) Mr. Johnson dated his notarizations July 28, 1983, the effective date of the partnership. Senator Durenberger never authorized this and was not aware this had occurred until recently.

Both the Senate Rules and Ethics Committees were made aware that reimbursements were being received for rents paid to the partnership. This is reflected in a March 13, 1984, memorandum from Lori Krage, then the Senator's bookkeeper, to Tom Horner, the Senator's Administrative Assistant who had asked her to make an inquiry. The memorandum stated:

SPOKE WITH MY CONTACTS IN ETHICS AND RULES AND NO ONE HAS A PROBLEM WITH THE PARTNERSHIP SITUATION. ETHICS SEEMED TO INDICATE THAT IT WOULDN'T BE THE FIRST TIME IT HAD BEEN DONE....

RULES ALSO SAID NO PROBLEM, BUT I DECIDED THAT IT WOULD BE WISE TO CHECK WITH ETHICS ALSO....

See S.C. Ex. 299.⁷

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⁷ The Senator's interest in "706-607 Partnership" (sic) was also revealed in the Schedule of Blind Trust Assets that Senator Durenberger filed with this Committee on February 5, 1986. The change of the partnership name to "703/603 Association" was handled by Dave Steingart.

In 1986, with changes in the tax laws imminent, Mr. Scherer decided he wanted to end his involvement in the partnership. Thereafter, Mr. Mahoney advised Senator Durenberger that he could not collect reimbursement if the condominium was returned to his sole ownership. Around the same time, Mr. Mahoney also expressed reservations about reimbursements for stays in the condominium while it was owned by the partnership. Why these reservations had not been voiced earlier is not clear; Mr. Mahoney had been handling condominium matters since late 1983.

At some time, Paul Overgaard, a businessman from Albert Lea, Minnesota, who frequently stayed in Minneapolis on business, offered to buy the condominium through his company, Independent Service Company (ISC). Overgaard's idea was that he could use the condominium during the week for business purposes and rent it to the Senator on the weekends. Exactly when an agreement was reached is not certain. Mr. Mahoney, who handled the transaction, Doug Kelley, the Senator's Administrative Assistant, and Mr. Overgaard have stated that this occurred in late '86 or early '87. The eventual sale agreement between ISC and the Durenberger Blind Trust is dated April 1, 1987. It is clear, however, that Mr. Mahoney prepared the document some-time later and backdated it. Mr. Overgaard's down payment

check to Senator Durenberger for \$7,350 is dated August 27, 1987.

Mr. Mahoney was slow to complete the transaction. Mr. Overgaard repeatedly complained about this, and even offered to reverse the transaction. Senator Durenberger sent notes to Mahoney urging that the paperwork be completed. See S.C. Ex. 322, 323, 341 and Attachment 8. Eventually this was done to Mr. Overgaard's satisfaction. Despite the delay, Senator Durenberger and Overgaard believed that the transaction was final, and was not a sham.⁸

Senator Durenberger collected reimbursements for official business stays in the condominium for rent paid to Independent Service Company from April 1, 1987 to November 12, 1989. On the instructions of Doug Kelley, the Senator's Administrative Assistant,⁹ the submission of reimbursement vouchers for rents for certain months in 1987 was delayed until paperwork regarding the sale was obtained from Mahoney. When Mr. Kelley believed the paperwork was in

⁸ A September 8, 1989 letter from Overgaard to Senator Durenberger expresses the fear that, if the transaction is not completed, he could "be accused of participating in a sham." This, of course, is far different from stating that the transaction was a sham.

⁹ Kelley is a lawyer and a former Assistant United States Attorney.

order, he allowed the requests for reimbursements to be filed.

On January 24, 1990, The Senate Rules Committee in essence concluded that the Senator could not collect reimbursements during adjournment periods for official business stays at the condominium because it was his usual place of residence. The Senator subsequently returned over \$11,000 to the Senate.

The Rules Committee decision was an interpretation of vague rules. Those rules state only that

The official duty station of Senators shall be considered to be their residence cities in their home States during adjournment sine die or the adjournment period authorized in odd-numbered years by Public Law 91-510.¹⁰

The Rules Committee decision turned on its determination that the term "residence city" means usual place of residence, not legal residence. Senator Durenberger's legal residence was Avon, Minnesota. Mr. Johnson had advised that, this being the case, the Senator could collect reimbursement. See S.C. Ex. 262 and Attachment 7.

The conclusion of the Rules Committee was contrary to the advice Senator Durenberger had received from his lawyers. It also was contrary to the advice Lori Krage of

¹⁰ Senate Travel Regulations, I. General Regulations, (C) p. II-52.

Senator Durenberger's staff apparently received from staff members of the Rules Committee and this Committee. Moreover, it should have been clear for years from the vouchers Senator Durenberger submitted for reimbursement that he always stayed in the same condominium when in Minneapolis. He was, however, never advised that this was a problem.

There is no evidence -- certainly no clear and convincing evidence -- that Senator Durenberger, Mike Mahoney, Dick Langlais, Roger Scherer, Paul Overgaard, Doug Kelley, Lori Krage and others conspired to circumvent Senate reimbursement rules in an unlawful manner. The Committee may decide that Senate reimbursement rules have been contravened, but it should not conclude that Senator Durenberger, who relied on lawyers each step of the way, intentionally violated Senate reimbursement rules. To the contrary, the involvement of multiple lawyers demonstrates the Senator's desire to stay within the rules.

If Senator Durenberger, Mr. Mahoney and others had intended to concoct a scheme to obtain Senate reimbursements in a deceptive, unlawful manner, surely they would have gone about it differently. Here we have the most bizarre and mystifying paper trail, replete with conflicting and back-dated documents. No one planning to cheat the Senate would have proceeded in such a haphazard, contradictory manner.

Sloppiness, lack of attentiveness, and poor lawyering we have; venality we don't. Some strong sanction may be required, but censure is not where the Senator acted on the advice of a half dozen lawyers.

SPEECHES ON CAPITOL GROUNDS

Whether [Senator Durenberger] may have violated 40 U.S.C. §193d, as interpreted by the Senate Committee on Rules and Administration, by giving speeches in U.S. Capitol and Senate facilities on or about March 3, 1985; March 25, 1985; April 11, 1985; April 24, 1985; September 9, 1985; and November 12, 1985, in exchange for payments directed to Piranha Press totalling approximately \$6,250.

Senator Durenberger spoke in Capitol rooms before the following organizations, which paid Piranha a fee:

March 20, 1985 -- National Conference on Catholic Charities in SR 385 (\$250)

March 25, 1985 -- Washington Campus (Hospital Corporation of America) in SR 385 (\$1000)

April 11, 1985 -- Washington Campus (New England Mutual Life Insurance Company) in SR 188 (\$1000)

April 24, 1985 -- American Protestant Health Association in S-211 (\$1000)

September 11, 1985 -- Farmland Industries in S-207 (\$1000)

November 12, 1985 -- Washington Campus (Hospital Corporation of America) in SR 385 (\$2000)

The issue as framed alleges that Senator Durenberger violated a criminal statute, as that statute has been interpreted by the Rules Committee, by making speeches

in Capitol facilities in exchange for payments made to Piranha Press. We respectfully submit that there is no basis for concluding that 40 U.S.C. §193d prohibits such conduct. Moreover, the Senate Rules Committee policies on use of Senate rooms do not purport to interpret this statute and do not clearly prohibit a Senator from receiving payment for a speech sponsored by an outside organization in Senate rooms. If such a policy exists, Senator Durenberger was unaware of it at the time the speeches were given, and any breach of the policy was completely unintentional.

A. Statutory Provision

Section 193d of Title 40¹¹ provides that:

It is forbidden to offer or expose any article for sale in said United States Capitol Grounds; to display any sign, placard, or other form of advertisement therein; to solicit fares, alms, subscriptions or contributions therein.

Violation of Section 193d is a misdemeanor punishable by a fine not exceeding \$500 or imprisonment not exceeding 6 months or both. 40 U.S.C. §193h.

The plain language of the statute does not prohibit accepting payment for a speech or appearance on

¹¹ We have been unable to find any reported case decided under this provision.

Capitol Grounds.¹² Moreover, as the language and legislative history of the statute demonstrate, Section 193d applies to activities conducted on "Capitol Grounds", not to activities conducted within "Capitol Buildings," which is the situation here.

The term "Capitol Grounds" is defined in Section 193a of Title 40 as comprising "all squares, reservations, streets, roadways, walks and other areas as defined on a map entitled 'Map showing areas comprising United States Capitol Grounds' ... including all additions added thereto by law...." The term "Capitol Buildings" is separately defined in 40 U.S.C. §193m as

the United States Capitol, the Senate and House Office Buildings and garages, the Capitol Power Plant, all subways and enclosed passages connecting two or more of such structures, and the real property underlying such structures.

In view of these separate and distinct definitions, it is clear that the terms "Capitol Buildings" and "Capitol Grounds" are not synonymous or interchangeable. Sections 193b, 193c, 193d, 193e and 193g of Title 40 proscribe certain activities on the "Capitol Grounds." In contrast, Section 193f proscribes certain other activities both "upon the United States Capitol Grounds [and] within

¹² It is not alleged that books were offered for sale or that any advertisements for the books were displayed in Capitol or Senate buildings.

any of the Capitol Buildings."

Prior to its amendment in 1967, Section 193f also proscribed activities only upon the "Capitol Grounds." The House Report accompanying the amendment adding the "Capitol Buildings" language stated that the purpose of the amendment was to make "clear that the offenses enumerated and prohibited [in Section 193f] apply with equal force in the Capitol Buildings as well as on the Capitol Grounds." H.R. Rep. No. 745, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News 1739, 1742. Section 193d was not similarly amended at, or since, that time to include language making the offenses enumerated applicable to the Capitol Buildings as well as the Capitol Grounds. The pertinent part of the legislative history is appended as Attachment 9.

Because a violation of Section 193d carries criminal penalties, it must be strictly construed. U.S. v. Emmons, 410 U.S. 396, 411 (1973). The absence of the "Capitol Buildings" language in Section 193d and its presence in Section 193f demonstrate that Congress did not intend to prohibit the activities described in Section 193d in the "Capitol Buildings." Furthermore, if such activities -- i.e., offering or exposing any article for sale -- were prohibited in Capitol Buildings, the Senate Restaurants, the gift stands, the barber shops, and even the vending machines

located throughout the Capitol Buildings are operating in violation of the law.¹³

B. Rules Committee Policies On Use of Senate Rooms

The Rules Committee has issued several letters and memoranda setting forth policies relating to the use of Senate rooms. Nowhere do the letters or memoranda assert that the policies were adopted pursuant to, or as interpretations of, 40 U.S.C. §193d. Nor do they make clear that a Senator may not speak in Senate rooms "in exchange for payment," as the statement of possible violation indicates.

The relevant pronouncements of the Rules Committee provide:

- (1) The occasion may not be a political fundraiser or rally; no fund-raising event for any purpose is permitted, and no cash may be received at or during the event for admittance or refreshments.

November 26, 1980 Memorandum to All Incoming Members of the Senate from the Staff of the Senate Committee on Rules and

¹³ If the statute does not prohibit payment for speeches given in Capitol Buildings, such conduct cannot be drawn within its provisions by a Rules Committee interpretation. See, Krichman v. United States, 256 U.S. 363 (1921) (while criminal statutes are to be given a reasonable construction, they are not to be interpreted so as to embrace offenses not clearly within the law).

Administration re: Procedures for Obtaining Meeting Rooms Assigned by the Rules Committee.

(2) In the past there have been complaints lodged against outside groups which use Senate rooms for a commercial purpose or for making a profit.

The Ethics Committee has asked the Rules Committee to make a clear policy on use of Senate rooms for profit-making purposes by outside groups.

It is the long-settled policy of the Rules Committee that no commercial or profit-making purpose should be served by the use of Senate rooms or facilities. This specifically includes tour groups which charge people a fee for participating in the tour. Senators should not use their names or offices to book rooms for such groups or purposes.

September 22, 1981 "Dear Senator" letter from Charles McC. Mathias, Jr., Chairman of the Committee on Rules and Administration. See S.C. Ex. 256.

(3) The occasion may not be a political fund-raiser or rally. No fund-raising event for any purpose is permitted, and no cash may be received at or during the event for admittance, refreshments, or for any products. No commercial or profit-making purpose whatsoever may be served by the use of these rooms.

September 22, 1981 Memorandum to All Members and Officers of the Senate from Charles McC. Mathias, Jr., Chairman, Committee on Rules and Administration, re: Procedures for Obtaining Meeting Rooms Assigned by the Rules Committee.

Id.

(4) There is no charge for the use of rooms, nor is there a charge for arranging set-ups by the Superintendent's office. Therefore, no charge is

allowed in connection with the use of any Senate space, nor may any charge be assessed for admittance or refreshments in Senate space. No product may be sold on the premises or displayed for future sale. No commercial, political, or profitmaking purpose whatsoever may be served by the use of Senate rooms. The sponsoring Senator will be held accountable for the enforcement of this clause.

Policy For Use of Senate Rooms, The Russell Rotunda and Hart Atrium attached to May 22, 1985 "Dear Senator" letter from Wendell H. Ford, Ranking Minority Member, and Charles McC. Mathias, Jr., Chairman, Committee on Rules and Administration (emphasis in original).¹⁴ See S.C. Ex. 257.

These policies clearly prohibit outside groups from engaging in commercial or profit-making activities in Senate rooms. There is, however, no indication that the organizations sponsoring Senator Durenberger's appearances -- the National Conference on Catholic Charities, the Washington Campus, the American Protestant Health Association and Farmland Industries -- used the rooms for commercial or profit-making activities. The issue, therefore, is whether it was improper for Senator

¹⁴ See also, Ethics Committee Interpretative Ruling No. 423 (February 5, 1988):

The Rules Committee has informed us that as long as a Senator is sponsoring a group or activity the only restriction on use of rooms assigned to that Senator is that the rooms may not be used for commercial, profit making, or campaign related matters.

Durenberger to speak to these organizations "in exchange for payments directed to Piranha Press."

The Rules Committee policies obviously were not designed to prohibit an outside organization from paying the costs connected with sponsoring an event in Senate rooms, e.g., for food and drink provided by the Senate Catering Service. Rather they prohibit such organizations from charging participants for use of the space, raising money, offering articles for sale and collecting cash at or during the event for admission and refreshments.

The policy statements do not specifically address the question whether a Senator may receive payment for giving a speech in a Senate room. Such a payment could be viewed as just another cost of the event, similar to the cost of food and drink, and thus permissible. If the policies do in fact prohibit the payment of a speaking fee to a Senator in such circumstances, Senator Durenberger is not the only Member of Congress who was unaware of this interpretation.

According to the evidence developed by the Special Counsel, other Members of Congress accepted payment, or directed that payment be made to a third party, for speeches delivered in Senate rooms at the same events at which Senator Durenberger appeared. Senator Mark Andrews and Congressman Richard Gephardt received honoraria for speaking

at the event sponsored by the American Protestant Health Association on April 24, 1985. The affidavit of Charles D. Phillips, former President of the Association, states that

Senator Durenberger, Senator Mark Andrews and Congressman Richard Gephardt each gave addresses during a noon luncheon on April 24th in Room S-211 of the Capitol Building.

...Senator Andrews and Congressman Gephardt each received an honorarium in connection with their appearances at the 1985 APHA Annual Forum. I considered the payment to Piranha Press for Senator Durenberger's appearance to be the same as the honorarium payments to Senator Andrews and Congressman Gephardt.

See S.C. Ex. 41, at 1-2.

Congressman Richard Cheney received honoraria for speaking at the Washington Campus events on March 25, 1985 and November 12, 1985. See S.C. Ex. 60 and Attachment 10 hereto.

Senator Dominici participated in the Farmland Industries event on September 11, 1985. Because he "was over his honoraria limit ... checks were paid to one or two charitable institutions in New Mexico" in lieu of payment to the Senator. See S.C. Ex. 157, at 5.

The fact that other Members of Congress have spoken in Senate and Capitol rooms in exchange for the payment of speaking fees demonstrates the lack of certainty in the Rules Committee policies. Under these circumstances, we

respectfully submit that it would be inequitable to sanction Senator Durenberger for conduct that is not expressly prohibited by the Rules Committee policies.

CAMPAIGN CONTRIBUTION

Whether [Senator Durenberger] may have converted a campaign contribution to [his] personal use in violation of Senate Rule 38, paragraph 2, and failed to report and deposit a campaign contribution in violation of 2 U.S.C. §434 and 11 C.F.R. §103.3, by transferring to Piranha Press the Pathology Practice Association Federal Political Action Committee check number 144 in the amount of \$5,000, dated December 30, 1986, made payable to "Durenberger for U.S. Senate."

The Pathology Practice Association ("PPA") issued an invitation to the Senator to speak at its annual meeting in San Francisco by letter of its president dated August 26, 1986. See Attachment 11. The letter states that "We would be pleased to make arrangements for honorarium, first-class travel and lodgings." The speech later was designated as a Piranha appearance. See Attachment 12.

Although Senator Durenberger's records indicate that arrangements for the speech were handled by Karen Doyne of Fleishman-Hillard, Inc., the registered lobbyist for the PPA (see Attachment 13), the Special Counsel has obtained an affidavit from Paul Johnson, another employee of Fleishman-Hillard. See S.C. Ex. 25. Mr. Johnson states that he supervised the arrangements for the appearance. He further states that, because Senator Durenberger did not request an

honorarium, the PPA Federal Political Action Committee ("PPA PAC") made a \$5000 contribution to Senator Durenberger's re-election campaign by check dated December 30, 1986. The check was made payable to "Durenberger for U.S. Senate." Id. The affidavit does not state to whom the check was sent. The Durenberger Volunteer Committee, the Senator's campaign committee, has no record of having received the check. Consequently, it did not report the contribution to the Federal Election Commission or deposit the check to the Committee's account.

On October 23, 1986, the PPA letter of invitation and scheduling information was telecopied to Michael Mahoney who handled arrangements for Piranha Press appearances. See Attachment 14. The Senator's records reflect that Piranha Press sent a memorandum regarding the appearance to Karen Doyne on October 27, 1986. See Attachment 15. The Senator's records further indicate that the PPA was to pay a fee of \$5000 for the appearance. See Attachments 12-14. There is nothing in the Senator's records or the records produced by the PPA to Special Counsel that explains why the PPA PAC made a contribution to the Senator's campaign instead of the PPA's paying Piranha an appearance fee.

The PPA PAC check was deposited into the Piranha Press account on January 12, 1987. See S.C. Ex. 210. Although the back of the check is not clearly legible, it

does not appear to bear Senator Durenberger's signature. Id. He also has no recollection of having endorsed the check to Piranha. Documents obtained by Special Counsel demonstrate that other checks made payable to Senator Durenberger for Piranha appearances were sent directly to Piranha Press and deposited to its account without having been endorsed by him. See Attachment 16.

Special Counsel has provided no evidence that the PPA PAC check was sent to the Durenberger Volunteer Committee or to Senator Durenberger's office or that the check was endorsed by the Senator. Thus, there is no basis for concluding that the Senator was even aware of the contribution, much less that he "transfer[ed]" the check to Piranha Press or intentionally "converted" it to his "personal use." It may well have been sent directly to Piranha and deposited.

At most, it appears that what we have here is a series of miscommunications or mistakes. The PPA may not have understood that the Senator's appearance was considered by the Senator's office and Piranha to be a Piranha appearance for which payment was to be made to it. It was a mistake for Piranha to deposit the campaign contribution in its bank account without further inquiry. In any event -- given the obvious confusion and the lack of evidence of

improper intent on the Senator's part -- no sanctions should be imposed on him for this occurrence.

TRAVEL REIMBURSEMENTS

Whether [Senator Durenberger] may have violated Senate Rule 34 (The Ethics in Government Act, as amended) by failing to disclose in a timely fashion on [his] annual financial disclosure forms for 1985 and 1986 the reimbursement of travel expenses related to approximately forty-three appearances and/or speeches.

When Senator Durenberger made out of town Piranha Press appearances in 1985 and 1986, the organizations sponsoring his appearances paid his travel expenses. He fully reported the payments he received from Piranha on his 1985 and 1986 Financial Disclosure Statements. See S.C. Ex. 241, 243. However, the travel expenses paid by the sponsoring organizations were not initially reported on those statements. Id.

There is no evidence that the initial failure to report the travel reimbursements was anything but inadvertent. Upon being advised informally by the staff of the Ethics Committee that the reimbursements should have been reported, the Senator promptly amended his 1985 and 1986 Financial Disclosure Statements to report these travel reimbursements. The amendments were filed on July 27, 1989. See S.C. Ex. 242, 244.

Senate Rule 34 provides that the Ethics Committee shall review Financial Disclosure Reports to determine whether they are filed in a timely manner, are complete and are in proper form. In the event a determination is made that a report is not so filed, the Committee shall inform the reporting individual and direct him to take all necessary corrective action. The Rule establishes no time limit within which the Committee must notify a Senator that his financial disclosure report is incomplete or within which a Senator may amend the report to make it complete.¹⁵

¹⁵ In contrast, the Ethics Reform Act of 1989 provides that, when the Ethics Committee believes that an individual has failed to file a complete financial disclosure report, it shall notify the individual what additional information is required and "the time by which it must be submitted." 5 U.S.C. Appendix 6 §106(b)(2). It further imposes a \$200 filing fee for any disclosure forms filed more than 30 days late. Id. at §104(d)(1). The 1978 Act contains no such provisions.

The House Committee on Standards of Official Conduct has issued a policy statement regarding the time within which amendments may be filed to financial disclosure reports. See Policy Regarding Amendments to Financial Disclosure Statements, Committee on Standards of Official Conduct Memorandum, April 23, 1986, reprinted in Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives, 100th Cong., 1st Sess. 134. We are unaware of any similar policy statement issued by this Committee as to the time within which amendments must be made to financial disclosure statements filed during the relevant time period.

Senator Durenberger made no effort to conceal his relationship with Piranha Press or the income he received from it. Although the initial failures to report the reimbursements on the 1985 and 1986 disclosure statements may have constituted technical violations of the rule, the violations were voluntarily remedied prior to any direction from the Committee to take corrective action. The Senator filed the amendments promptly after the mistake was called to his attention.¹⁶

Because the Rule imposes no time limitation on the filing of amendments, we respectfully submit that no sanction is warranted for Senator Durenberger's failure to disclose the reimbursements in a "timely fashion." Such a result would be fully consistent with the legislative history of the Ethics in Government Act of 1978. The Senate Governmental Affairs Committee Report on the legislation states in pertinent part:

If an individual inadvertently fails to report an item or improperly lists or classifies an item on a financial disclosure statement, it is the hope of the Committee that the supervising ethics office or agency which reviews the financial disclosure report upon filing will seek voluntary compliance with the requirements of this title.

¹⁶ Mr. Abney was informed that the error would be corrected some weeks before the amendments actually were filed.

[I]t is the intention of the Committee that inadvertent or technical violations be handled by the supervising ethics office through informal means or administrative action....

S. Rep. No. 170, 95th Cong., 2d Sess. 140 (1978).

LIMOUSINE SERVICE

Whether [Senator Durenberger] may have violated Senate Rule 35 by accepting gifts of limousine service for round trip transportation between the Boston metropolitan area and Concord, Massachusetts, on approximately 21 occasions in 1985 and 1986 for a total value of approximately \$4,935.

Senator Durenberger traveled to the Boston area frequently in 1985 and 1986 to meet with his marriage counselor Dr. Armand Nicholi. Dr. Nicholi's office is located in Concord, Massachusetts. The Senator's appointments with Dr. Nicholi generally were scheduled from 8:00 a.m. to noon. The Senator frequently scheduled luncheon meetings with organizations located in the Boston metropolitan area after his counseling sessions with Dr. Nicholi. On those occasions, the cost of round trip transportation between Boston and Concord by private car was paid by these organizations.¹⁷

¹⁷ The Senator did not accept honoraria on these occasions. Special Counsel's evidence also indicates that on three occasions a company paid for private car transportation even though the Senator did not meet with representatives of that company at those particular times.

At the time, Senator Durenberger viewed the private car transportation as incidental to his speaking engagements. As he stated to the Committee, he never questioned the propriety of a sponsor's providing transportation to or from Concord because Senators generally are accustomed to the convenience of a private car. A waiting car facilitated his arriving on time for luncheon meetings.¹⁸

During the course of the investigation, the Senator has learned that the costs incurred by the organizations in providing round trip transportation between Boston and Concord was not insubstantial. He has acknowledged his mistake in accepting this transportation. For present purposes, we assume that the gift rule is implicated. The question, then, becomes what sanction is required.

As the discussion below of Senate and House precedent shows, violations of the gift rule are usually punished, if they are punished at all, by some sanction short of censure. Standing alone, Senator Durenberger's acceptance of gifts of private car transportation surely

¹⁸ This matter might be viewed with less concern if the sponsoring organizations had provided private car transport only from Concord to the location of the meeting in Boston.

would not justify censure. We respectfully suggest that, even when considered together with the other matters under investigation, nothing more than a strong reprimand is warranted for any gift rule violations.

BLIND TRUST

Whether [Senator Durenberger] may have violated the provisions of the Ethics in Government Act relating to qualified blind trusts, including Sections 702(e)(3)(c) and 702(e)(6) relating to communications regarding the trust and its assets.

In 1985, acting on Mr. Mahoney's advice, Senator Durenberger created a blind trust. In retrospect, the blind trust, which had Mr. Mahoney as its trustee, made little sense from its inception.¹⁹ Senator Durenberger, however, consented to the idea because he wanted to conduct his affairs in an ethically proper manner.

Three assets initially were in the trust: Senator Durenberger's interest in the partnership that owned the condominium he rented while in Minneapolis, his interest in a money market account, and his interest in a corporation. Normally, blind trusts are used by wealthy public servants

¹⁹ The blind trust instrument was submitted to the Senate Ethics Committee on October 17, 1985. A list of the trust's assets and their valuation categories was sent to Wilson Abney in a letter dated February 5, 1986. The Ethics Committee notified Senator Durenberger of its approval of the trust by letter dated February 24, 1986.

to avoid conflicts of interest. Here, however, the value of the assets in the blind trust was limited. Senator Durenberger was hardly a typical wealthy legislator.

The inclusion of the partnership interest involving the condominium where Senator Durenberger stayed was particularly inappropriate. It was inevitable that Senator Durenberger would have knowledge about condominium financial matters and any disposition of it. The inclusion of the condominium partnership interest virtually ensured that the rules regarding communication of information about a blind trust asset would be broken.

Moreover, Mr. Mahoney purposely engaged Senator Durenberger in discussions about the condominium, particularly regarding its sale. See, e.g., S.C. Ex. 303. Senator Durenberger was not cautioned that there should be no discussion between him and his trustee about such matters. Indeed, Senator Durenberger was informed by Mr. Mahoney's office that certain actions as to the sale would not be taken without his comments. See S.C. Ex. 340.

It thus appears that a violation of the blind trust regulations regarding communications occurred. We submit, however, that in these circumstances -- where the Senator's lawyer, who was also his trustee, sought out communications with Senator Durenberger about a trust asset -- no sanction of great consequence is warranted. This is

clearly a case where Senator Durenberger had no notion that he was violating the requirements of the Ethics in Government Act.

PERSONAL CONSIDERATIONS

During the period when his publishing and condominium arrangements came about and were implemented, Senator Durenberger was under immense strains and pressures, personal and otherwise. These are discussed briefly, because they provide context for Senator Durenberger's financial decisions that now appear unwise.

Senator Durenberger was not a rich man when he came to the Senate. His income since has come mainly from his Senate salary and speaking engagements. The reduction in the honorarium limit, which was passed in 1983 and became effective in 1984, was a major financial blow; the Senator had earned over \$92,000 in honoraria in 1983. As publicized in the press, he has had to borrow heavily. His wife, Penny, has been a homemaker and student, and has contributed only infrequently to the family income.

Although Senator Durenberger's income has been modest, his expenses have been significant. During the period in question, he had four sons of college age. The costs of college and private preparatory schooling have been high. Penny also has been a student, seeking a Masters

Degree in social work from Catholic University. Two of his sons had chemical dependency problems that required periods of expensive institutionalization. The Senator's own counseling in Boston was also costly. For a while Senator Durenberger owned two homes -- one in the Washington area, the other in Minneapolis, until in 1983 the expense became too great. The Committee has obtained several documents that show the Senator's anguish over his financial condition. See S.C. Ex. 304.

Added to the financial strain were pressures within the family. Senator Durenberger's first wife died of cancer, leaving him with four young sons. Penny had lost her husband in Vietnam. Their subsequent marriage has never been an easy one. The boys' discipline and drug problems heightened the tensions between the Senator and Penny.

The two separated for twenty months in early 1985. Senator Durenberger went to live at The Cedars, a religious retreat in Virginia run by Douglas Coe, whose affidavit is attached as Attachment 17.²⁰ He also began to see a marriage counselor, Dr. Armand Nicholi, of Concord, Massachusetts. As he has said, his religion and this

²⁰ Because Mr. Coe is in Africa, his affidavit is not yet signed and notarized. However, he has reviewed and approved this affidavit.

counseling have been major supports in his time of personal crisis.

Part of Senator Durenberger's problems have been an unfortunate by-product of the prodigious hours he has worked as a Senator. The daily schedules the Committee has received are testimony to his immense efforts to be an effective Member of Congress. He put his energies to this task and to speaking, which to him was both a passion and a mission; this Committee has heard him comment on the importance he attached to communicating his ideas. But his work schedule left him drained and enervated, with little time for family problems and even less for personal, financial matters.

The result, as to financial matters, was that Senator Durenberger came to rely heavily on staff, friends and lawyers for financial advice and help. His original Chief of Staff and Administrative Assistant died in December 1983. At times in 1984-85 his staffing situation was chaotic, with key jobs not filled or key aides on leave for extended periods. He thus turned with great frequency to Minneapolis lawyers, and relied on them. It appears that his Senate workload,²¹ his family strains, and his financial

²¹ During the period in question, the Senator served on as many as five Senate Committees and held three subcommittee chairmanships at the same time.

problems impaired his judgment and made him all too susceptible to the questionable legal advice it is obvious he received.

Perhaps these facts are not wholly exonerating. But they do suggest compassion and understanding as the Committee proceeds to decide what sanction is appropriate.

HISTORY OF RECENT DISCIPLINARY CASES

Recent disciplinary cases in both the Senate and House indicate that some remedy short of censure would be appropriate in the present situation.

Only two Senators since 1950 have been censured. Senator Joseph McCarthy was censured (condemned²²) in 1954 for intentionally obstructing Senate committee investigations and for repeatedly abusing and defaming Members of the Senate in a most offensive manner.²³ Senator Tom Dodd had intentionally misled constituents by stating that money collected at fund raisers and political testimonial dinners

22 The record of debate in the McCarthy matter showed that the terms "censure" and "condemn" were considered to be synonymous.

23 The special committee that considered Senator McCarthy's conduct did not recommend censure for the release of certain classified information because "at the time in question Senator McCarthy was under the stress and strain of being tried or investigated by the subcommittee.... These mitigating circumstances are such that we do not recommend censure" for this conduct.

would be used to pay off his campaign expenses and debts. In fact, much of the money (\$116,000) was diverted for Senator Dodd's personal purposes.²⁴ In the present circumstances, where Senator Durenberger relied on numerous attorneys, an FEC advisory opinion, and advice from the staff of the Rules Committee and this Committee, the evidence does not show intentional violations of laws or Senate rules.

In 1979, the Senate Ethics Committee found that Senator Herman Talmadge "knew, or should have known" of certain unlawful or improper acts, including theft of Senate funds by his principal aide. The Committee's Resolution "denounced" Senator Talmadge, but he was not censured. The Resolution specifically noted that "the facts in this investigation are distinguishable from those of earlier matters in which the Senate 'censured' or 'condemned' a Member." The record shows that censure was deemed inappropriate because the evidence did not clearly and convincingly show that Senator Talmadge had intentionally violated laws or Senate rules.

The Talmadge case involved facts far more serious than the present circumstances. His aide admitted stealing

²⁴ In 1981, this Committee voted to expel Harrison Williams for bribery and other crimes after he was convicted of these offenses.

from the Senate by using phoney reimbursement vouchers and there was at least some evidence indicating that Talmadge knew about this. Talmadge, moreover, did not assert that he had relied on legal advice, or opinions and advice from governmental bodies. The sanction Talmadge received is not appropriate here.

In 1978, the Ethics Committee concluded that Senator Edward Brooke had committed several violations of law, including "false testimony under oath." However, the Committee determined that no investigation was required because Brooke was no longer in the Senate and because "the Committee does not believe the violations mentioned in its Report are sufficiently serious to justify the severe disciplinary actions specified in Senate Resolution 338," including censure.

Recent Senate and House precedent also indicate that censure is not appropriate for violation of Senate gift and reporting rules, or for minor improper handling of campaign funds. Talmadge, for example, failed to report gifts, including gifts of transportation. The Committee also concluded that campaign funds in excess of \$10,000 had not been reported and had been deposited into an account that disbursed money for the benefit of the Senator's

Administrative Assistant. Senator Brooke's financial statements had not disclosed stock ownership, his guarantee of a loan, and joint ownership of property with his mother.

In 1988, Representative Charles Rose was only "reproved" for borrowing money from his campaign funds, failing to report those loans on his financial disclosure statement, and failing to report other liabilities to financial institutions. Ferdinand St. Germain in 1987 received no discipline at all, even though on various disclosure forms he (1) undervalued restaurants he owned, (2) failed to reveal a stock purchase, rent payments, and loans, and (3) underreported his income, once by \$400,000. Despite St. Germain's repeated violations of the House Ethics Code and the Ethics in Government Act, the Committee concluded that "the identified improprieties do not rise to such a level warranting further actions by this Committee."

In 1986, Representative Dan Daniel received no discipline although the House Ethics Committee concluded that he took at least 68, and perhaps more than 200, trips on airplanes owned by Beech Aircraft Corporation. The Committee found that 47 of the 68 flights were gifts unrelated to his official responsibilities. The Committee concluded that the House disclosure and gift rules were violated, but found it significant that Daniel had misinterpreted the requirements of the House rules, had

reimbursed Beech, and had amended his financial disclosure forms.

In 1987, Representative Richard Stallings was rebuked by the House Ethics Committee for borrowing money from his campaign funds for personal uses - e.g., to buy a car. Mitigating factors included repayment of the loans and the fact that the loans had been reported on his financial disclosure forms. In 1986, Representative James Weaver received no discipline at all for borrowing \$81,677 from campaign funds for commodity trading and for incomplete financial disclosure reports. The unanimous Ethics Committee apparently rejected sanctions because other facts showed that "there was no evidence of an intent to avoid public notice of the loans."

The only House Member censured in the last ten years was Charles Wilson, who was punished in 1980 for flagrant, intentional violations of House rules. Wilson was censured for using almost \$25,000 in campaign funds to repay personal loans and cover personal obligations, and for accepting over \$10,000 in checks from a person with direct interest in legislation.

Particularly significant is the 1984 case of Representative George Hansen. Hansen was convicted under the False Statements Statute, 18 U.S.C. §1001, for filing false disclosure statements regarding his wife's loans and

her profits from a silver commodities transaction, but was only reprimanded by the House. The Ethics Committee did not accept his contention that he relied on the advice of counsel and advice from the Committee, but recognized the defense, stating that "to rely on advice of counsel (and the analogous reliance on advice from the Committee), the advice must be sought in good faith, all material facts must be given to the attorney and the person seeking advice must then follow the advice given."²⁵

In sum, the historical record shows that censure has been reserved for the most serious cases of intentional wrongdoing. It indicates that, where there is reliance on counsel or official advice,²⁶ misinterpretation of the rules, attempts to correct errors, or other such mitigating factors, censure is inappropriate. The historical record

²⁵ Even if the defense is not technically available, the fact that advice was honestly and repeatedly sought is evidence of a lack of improper intent.

²⁶ One of the issues in the Jim Wright case involved the application of the honorarium limitations to income generated from the sale of his books, but the House Ethics Committee never entered any findings of wrongdoing. Unlike Senator Durenberger, Congressman Wright did not obtain and rely upon an FEC Advisory Opinion. Nor is there any indication in the Committee Report that he relied on the advice of counsel as to the propriety of his actions.

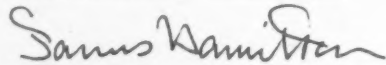
suggests that some sanction less than censure is appropriate here. As discussed above, Senator Durenberger relied on counsel, an FEC opinion, and sought advice from the staff of the Rules Committee and this Committee; there have been misinterpretations of the reimbursement rules by several lawyers; and there have been attempts at rectification -- a payback of excessive Senate reimbursements and amendments of financial disclosure forms. Given all this, it is simply not just to censure him and thus place him in the same historical category as Joe McCarthy.

Conclusion

We conclude by recognizing this Committee's serious responsibilities. If it determines that violations of laws or rules have occurred, we know it must act. But, we respectfully suggest, a major part of its responsibilities is to be fair and just to Senator Durenberger. If this is not a censure case -- if the evidence does not clearly and convincingly show that he intentionally violated laws or rules -- then he should not be censured. We ask the

Committee to resolve this matter with some lesser sanction,
such as a strong reprimand, and to do so without a hearing.

Respectfully submitted,



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ATTACHMENT 1

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October 1, 1984

Senator Dave Durenberger
353 Russell Senate Office Building
Washington, D.C. 20515

HONORARIUM LIMITATIONS UNDER THE FEDERAL ELECTION CAMPAIGN ACT
AND PUBLIC LAW 98-63
OUR FILE NO. 01248-013

Dear Senator Durenberger:

Attached is a copy of our opinion regarding honorarium limitations. This opinion is a "clean" opinion for public review. However, the opinion obviously is based upon the facts and the law as we understand them at this time. For your review and analysis we have set forth below the analysis upon which our opinion is based.

You asked us for an opinion clarifying whether payments to you under your proposed Publisher Agreement (the "Agreement") with Piranha Press (the "Publisher") would violate "honoraria" limitations imposed by the Federal Election Campaign Act and the Jackson Amendment imposing a 30% ceiling on honoraria income for members of Congress.

Under the Agreement you are to grant to the Publisher, for the full term of your copyright(s) in your book(s), the nonexclusive right to print, publish, sell and distribute your book(s) in the United States, Canada and Nations of the European Economic Community. Further, under the Agreement you are required to make such special appearances in promotion of the book(s) and the Publisher as are mutually agreed upon by yourself and the Publisher. You have agreed to make a minimum of 30 such appearances.

As compensation for the granting of the publishing rights and your promotional work, the Publisher has agreed to pay you \$100,000, payable in quarterly installments of \$12,500, and a

Senator Dave Durenberger
 October 1, 1984
 Page 2

royalty of 25% of the net proceeds from sales of the book(s) (less the expenses of printing and publishing).

The Federal Election Campaign Act of 1971, as amended (the "Act"), limits the amount of money that any elected or appointed officers of the Federal Government may accept as an "honorarium" to \$2,000 for any appearance, speech or article. 2 U.S.C. §441i (as amended by Public Law 95-216, December 20, 1977).

Federal Election Commission (the "Commission") regulations define "honorarium" as a payment of money or anything of value received by an officer or employee of the Federal Government, if it is accepted as consideration for an "appearance, speech, or article." 11 CFR §110.12(b).

Income realized from the publication of books is not considered "honoraria"; hence, it is not subject to the limitations of 2 U.S.C. §441i. See Advisory Opinion 1975-77. Accordingly, any royalties paid to you from the sale of the book(s) would not be considered an honorarium under the Act and is not, therefore, limited by the Act.

The money to be paid to you for your promotional activities is more problematic. Although it would appear that these payments to you would be for appearances and would be limited under the Act, the Commission has held that money paid to a Senator on a fixed, regular basis for ongoing services to an independent publisher is a stipend and not honoraria income. See Advisory Opinions 1980-76, 1975-46, and 1979-78. The Commission regulations define "stipend" as a payment for services on a continuing basis. CFR 110.12(c)(3).

In Advisory Opinion 1979-78 the Commission held that the payment of a \$15,000 serialization fee by The New Yorker magazine to Senator Daniel Moynihan's publisher, Atlantic, Little & Brown, for the first time serialization of a book to be published, of which \$12,750 was to be paid to Senator Moynihan, did not constitute an honorarium. The Commission noted that since the fee was negotiated with the publisher and paid by the magazine to the publisher, the fee was additional consideration under the book publishing contract.

In Advisory Opinion 1980-76 the Commission held that the payment to Senator William Proxmire of \$100 per month from the Cato Institute for doing a monthly radio program and as a weekly contributor to the David Letterman show did not constitute honorarium income. The Commission noted that an honorarium is

Senator Dave Durenberger
October 1, 1984
Page 3

distinguished from a stipend "which is a payment for services on a continuing basis, including a salary or other compensation paid by news media. . . ."

In Advisory Opinion 1975-46 the Commission held that the payment to Representative Barbara Jordan for occasional televised commentary did not constitute honoraria. Representative Jordan had entered into an oral agreement with CBS to videotape editorial comments once a month for presentation on the CBS Morning News Show. Representative Jordan received \$150 for each taping. The Commission noted that for money to be considered to have been received for an honorarium it must have been paid for a single event and under circumstances that do not imply a continuing compensatory relationship for services. Even though Representative Jordan was not subject to a written continuing contract the Commission felt that the oral agreement contemplated a regular and continuing relationship for services and thus constituted a stipend.

We are of the opinion that payments to be made to you under the Agreement for appearances satisfy the test of being payments for services on a fixed and continuing basis and thus constitute a stipend rather than an honorarium.

In addition to the limitation on receipt of \$2,000 per speech, article or appearance, members of Congress are limited with respect to the maximum amount of honorarium income they may receive per year. Under Public Law 98-63, 4 U.S.C. §31-1, no member of Congress shall accept honoraria attributable to any calendar year that total more than 30% of the member's salary during such year.

It is clear from the legislative history that Public Law 98-63 was intended to replace the yearly ceiling on honoraria income that had previously been included in the Act, but had been eliminated in 1981. See Public Law 97-51; Congressional Record June 16, 1983.

The definition of "honorarium" under Public Law 98-63 is identical to that under the Act.

We are of the opinion that Public Law 98-63 should be read in conjunction with the Act and that if a payment does not constitute an honorarium under the Act it does not constitute an honorarium under Public Law 98-63. Since we have determined that the payments to you under the terms and conditions of the Agreement will not constitute honoraria under the Act, we are

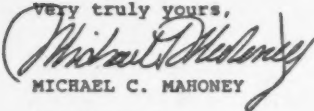
Senator Dave Durenberger
October 1, 1984
Page 4

also of the opinion that such payments will not constitute honoraria under Public Law 98-63.

We suggest that this matter be clearly decided by means of an advisory opinion from the Commission.

We have not been asked to address any issues under the Senate Ethics Rules relating to conflicts of interest and financial disclosure or federal and state income tax treatment.

Very truly yours,


MICHAEL C. MAHONEY

Enclosure

CURTIN, MAHONEY & CAIRNS
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

4000 MULTIPLEX TOWER
MINNEAPOLIS CITY CENTER
MINNEAPOLIS, MINNESOTA 55408
TELECOPIER (608) 200-9999
TELEX 994990
TELEPHONE (608) 200-9442

1800 N STREET N.W.
SUITE 400
WASHINGTON, D.C. 20006
TELECOPIER (202) 500-9944
TELEX 94 000
TELEPHONE (202) 507-0706

October 1, 1984

Senator Dave Durenberger
353 Russell Senate Office Building
Washington, D.C. 20515

HONORARIUM LIMITATIONS UNDER THE FEDERAL ELECTION CAMPAIGN ACT
AND PUBLIC LAW 98-63
OUR FILE NO. 01248-013

Dear Senator Durenberger:

You have asked for our legal opinion as to whether the payment to you of money by Piranha Press ("Piranha") under the terms and conditions of the Publisher Agreement (the "Agreement") with Piranha would constitute payment to you of an "honorarium" in violation of the limitations imposed on such income under the Federal Election Campaign Act of 1971, as amended (the "Act"), and Public Law 98-63.

We have participated in the preparation of the proposed Agreement with Piranha and the request to the Federal Election Commission for an advisory opinion on your behalf. As to various questions of fact material to our opinion, we have relied upon representations made in the Agreement and upon representations made by yourself and Thomas Horner, your Administrative Assistant. We have also examined letters of public officials, advisory opinions, cases, statutes, documents, records, certificates, opinions, and instruments and have made such other investigation as we have deemed necessary in connection with the opinions hereinafter set forth. We have assumed the authenticity of all documents submitted to us as originals, the genuineness of all signatures, the legal capacity of natural persons, and the conformity to the originals of all documents submitted to us as copies. Based upon the foregoing, we give our opinion to you as follows:

1. Any payment to you by Piranha under the terms and conditions of the Agreement as a royalty based on net proceeds from the

Senator Dave Durenberger
October 1, 1984
Page 2

sales of the book(s) would not be considered income from honorarium under the Act and the regulations thereunder or Public Law 98-63.

2. Any payment to you by Piranha under the terms and conditions of the Agreement for promotional appearances to promote the book(s) and Piranha would not be considered income from honorarium under the Act and the regulations thereunder or Public Law 98-63.

Very truly yours,

Curtin, Mahoney & Cairns

CURTIN, MAHONEY & CAIRNS
A Professional Association

ATTACHMENT 2

CURTIN, MAMONEY & CAIRNS
ATTORNEYS AT LAW

1000 N. STREET N.W.
WASHINGTON, D.C. 20004
TELEPHONE: 333-3300
TELETYPE: 333-3300
FAX: 333-3300

1000 N. STREET N.W.
WASHINGTON, D.C. 20004
TELEPHONE: 333-3300
TELETYPE: 333-3300
FAX: 333-3300

October 19, 1984

Minneapolis

AOR 1984-56

Office of the General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D.C. 20463

ATTN: Mr. Bradley Litchfield
Assistant General Counsel

OUR FILE NO. 01468-007

Ladies and Gentlemen:

This letter is written to request an advisory opinion on whether the limitations relating to the receipt of "honoraria," as that term is defined in 2 U.S.C. 441i, would apply in the following transaction:

Senator David Durenberger has written a book entitled Neither Madmen nor Messiahs. The book, as published, is approximately 116 pages long. It is published by an independent publisher, Piranah Press, a division of Diamond Publications ("Publisher"), and will be distributed by the Publisher through traditional and exclusive channels of distribution. For example, the book is currently offered for sale at B. Dalton Booksellers.

Under the Author-Publisher Agreement, Senator Durenberger as Author has conveyed certain rights in the Work to the Publisher and has agreed to make, over a two-year period, a specified number of promotional appearances for purposes of promoting the book and the Publisher at such times and places as may be agreed upon between the Author and the Publisher.

As compensation for the rights in the Work transferred by Senator Durenberger and for the personal services to be rendered by him

Office of the General Counsel
October 19, 1984
Page 2

in promoting the Work and the Publisher, the Publisher has agreed to pay an agreed to sum in quarterly installments over a two-year period. In addition to these amounts, Durenberger is to receive a royalty based on the net proceeds from sales of the Work.

It is our opinion that none of the income to be received from the Publisher should constitute honoraria under the statute or rules cited above. Our reasons for this opinion are summarized below:

1. The restrictions on receipt of honoraria has been interpreted to exclude income received from books or stipends. To the extent that income is to be paid to the Senator under the Publishing Agreement, it is either payment for the rights to publish the Work or for services to be rendered on a continuing basis to the Publisher over a two-year period.
2. Based on the positions taken in the few advisory opinions that have been given on related issues, it would appear that the income to be paid to the Senator qualifies as a stipend and not an honorarium as it is to be paid on a fixed, regular basis for ongoing services to be rendered to an independent publisher. [See advisory opinions AO 1980-76; AO 1975-46; AO 1975-77.]

Please advise us of your opinion on this matter or if further information is needed.

Very truly yours,

Michael C. Maroney
MICHAEL C. MARONEY

and

Conna E. Hanberry
CONNA E. HANBERRY

Attorneys for Senator David Durenberger

ATTACHMENT 3

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 25, 1984

AOR 1984-56

Michael C. Mahoney
Donna E. Hanbery
Curtin, Mahoney & Cairns
Attorneys at Law
4150 Multifoods Tower
Minneapolis City Center
Minneapolis, Minnesota 55402

Dear Mr. Mahoney & Ms. Hanbery:

The Office of General Counsel has your letter of October 19, 1984, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended.

Your inquiry is under consideration by the legal staff and if additional information is needed, this office will contact you.

In accordance with the Act and Commission regulations, this office will ask the Commission to consider a response to your request at an early date. See 2 U.S.C. § 437f and 11 C.F.R. Part 112.

Sincerely,

A handwritten signature in dark ink, appearing to read "N. Bradley Litchfield", is written over a horizontal line.

N. Bradley Litchfield
Assistant General Counsel

ATTACHMENT 4

11.138

Advisory Opinions

117 1-17-85

Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Dated: November 30, 1984.

- 1/ The Commission notes that it is not reaching any conclusions of law or making any finding of fact in this opinion with respect to the circumstances in which the original contributions were made by the corporation and received by your committee or any other person. Such an analysis and review would only be appropriate pursuant to the enforcement process and procedures. See 2 U.S.C. §437g and 11 CFR Part 111.
- 2/ Commission regulations provide that contribution refunds shall be itemized with identification of the person who receives the refund. 11 CFR 104.3(b) (4) (v). Although not required, your committee may identify the individuals in whose names these corporate contributions were originally made. Amendments to prior reports are not necessary with respect to the refund.

DISSENTING OPINION

OF

COMMISSIONER JOAN D. ALKENS

TO

ADVISORY OPINION 1984-52

Through information obtained in a grand jury investigation and reported in the news media September 11, 1984, Congressman Russo determined that his campaign committee, as well as other campaign committees, received illegal corporate contributions. These contributions were made from the personal accounts of corporate employees with funds provided to the employees through bonuses from the corporation.

The Commission in this advisory opinion has taken the position that as a general rule, contributions prohibited by the Act shall be returned by the recipient once their unlawful nature is discovered based on the regulations at 11 C.F.R. 103.3(b). The record has shown for the past three years that certain individuals contributed to Congressman Russo and the other candidates. If that section of the regulations is applied, in my opinion the refunds should be made to the individual contributors listed on the candidates' reports as having made the contributions. Congressman Russo has stated that he was not aware of the illegality of the contributions until nearly three years after the contributions were made.

This opinion requires the refunds to be made to the Board of Trade Clearing Corporation. With no apparent nexus between the individual contributors and the corporation, Congressman Russo's reports will now reflect a refund to the corporation without any indication as to the rationale for the refund. I believe the contributions should be refunded to the corporate employees since the contributions were made from the personal accounts of the employees. To reimburse the corporation would be to unjustly enrich the entity which instigated the illegal raise and would never clearly show on the public record the correction prescribed by the Commission. For this reason, I voted against the advisory opinion.

Dated: December 6, 1984.

[55798] AO 1984-56: Royalties as Honoraria

[Royalties received from sales of a book do not constitute honoraria, nor do amounts paid to the author for promotional appearances in connection with the book. Answer to Michael C. Mahoney and Donna E. Hanbery of Curtin, Mahoney & Cairns, 4150 Multifoods Tower, Minneapolis City Center, Minneapolis, Minnesota 55402.]

This responds to your letter of October 19, 1984, requesting on behalf of Senator David Durenberger concerning application o

advisory opinion
federal Election

Campaign Act of 1971, as amended ("the Act"), to an author-publisher agreement involving Senator Durenberger.

You state that Senator Durenberger has written a book entitled Neither Madmen nor Messiahs. You add that the book is published by Piranah Press, a division of Diamond Publications ("publisher"), and will be distributed by the Publisher through traditional and customary channels of distribution.

According to your request, under the author-publisher agreement Senator Durenberger has conveyed to the Publisher certain rights in the book and has also agreed to make a specified number of promotional appearances over a two-year period to promote both the book and the Publisher. As compensation for the rights in the book transferred by Senator Durenberger and for the personal services to be rendered by him to promote the book and the Publisher, the Senator will be paid an agreed-to sum in quarterly installments over a two-year period as well as a royalty based on the net proceeds from sales of the book. In light of these facts, you ask whether any of the income to be received by Senator Durenberger from the Publisher would constitute honoraria under the Act or Commission regulations.

Under 2 U.S.C. §441i, no person who is an elected or appointed officer or employee of any branch of the Federal Government shall accept any honorarium of more than \$2,000. The Commission's regulations define the term "honorarium" to mean the payment of money or anything of value received by such person as consideration for an appearance, speech, or article. 11 CFR 110.12(b). The Commission has previously determined that income realized from the publication of books is not considered honoraria, and therefore is not subject to the limitations of 2 U.S.C. §441i. See Advisory Opinions 1975-77 [45134] and 1978-59 [45351]. Accordingly, any royalty paid to Senator Durenberger on the basis of the net proceeds from sales of the book would not be considered an honorarium under the Act and regulations and would not be limited.

The Commission also notes that the regulations exclude from the definition of honorarium the term "stipend." A stipend is defined as a payment for services on a continuing basis. 11 CFR 110.12(c) (3). The Commission concludes that the arrangement you have described, whereby the Publisher will pay Senator Durenberger in quarterly installments over a two-year period for promotional appearances, creates a stipendiary relationship. Accordingly, payments made to Senator Durenberger under this agreement would not be viewed as honoraria and therefore would not be subject to limitation under 2 U.S.C. §441i.

The Commission expresses no opinion as to possible application of Senate rules to the described transaction, nor as to any tax ramifications, since those issues are outside its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. 2 U.S.C. §437f.

Dated: December 6, 1984.

[45799] AO 1984-57: Lobbying Activity by Corporation
[A corporation may use a company newsletter to encourage support of certain legislation since that is lobbying and not electioneering. Answer to Patrick G. Golden, Pacific Gas & Electric Company, Law Department, P. O. Box 7442, San Francisco, California 94120.]

This refers to your letter of October 30, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the proposed publication of an article in the Pacific Gas and Electric Company's employee newsletter.

You state in your request that Pacific Gas & Electric Company ("the Company") publishes a weekly newsletter which is made available to Company employees, retirees, and employees on long-term disability. You indicate that the Company is concerned about takeovers of hydroelectric projects by municipal utilities, and supports pending Federal legislation to prevent such takeovers and to require compensation if such takeovers occur. You state that both of California's U.S. Senators and 12 Members of the U.S. House of Representatives currently co-sponsor such legislation. You propose

ATTACHMENT 5

MEMORANDUM

TO: Senator Durenberger
 FR: Douglas A. Kelley
 DATE: February 25, 1986
 RE: Meeting with Bill Canfield, Senate Select Committee on Ethics

I visited with Bill Canfield, staff attorney, Senate Select Committee on Ethics today concerning our disclosure of outside income. I informed Canfield that at the time of the inception of Piranha Press you had had a conversation with Clendon Lee and had run the details of Piranha Press by him for his approval. Canfield remembered the conversation you had with Lee because Lee had discussed the issue with Canfield and other staff lawyers at that time. Lee, as you told me, found no problems with the arrangement from the Ethics Committee viewpoint. Canfield was also aware that the Federal Election Commission had subsequently issued an opinion stating that the income from Piranha Press would be considered to be a stipend rather than honoraria.

I asked Canfield whether any follow-up should be made to the Clendon Lee conversation or whether we should request a formal opinion from the Ethics Committee. Canfield informed me that an opinion would be an unnecessary redundancy because the FEC's determination that the income would be stipendiary in nature was dispositive of the issue. Canfield said the FEC was the proper forum to interpret the Federal Campaign Practices Act and that the only concern the Ethics Committee had was whether or not the income derived from the arrangement would be reported as required by Title 2 United States Codes, Section 441(i).

Canfield also informed me that neither Cohen, Hart, nor Moynihan had requested opinions on the income derived from any of their recently published books.

cc: Michael Mahoney

PC Wilson Abney 6/13/88 Read above memo to WA to forward him of press calls. WA said FEC has juris on Title 4412 (\$2k limit) and SSCE has juris on 2 USC 31-1 (40% limit). WA informed me that he would not respond to press inquiries re arrangement. TK

PC Bill Canfield 6/13/88 Read above memo to EC for accuracy. He said it accurately reflected our conversations. TK

MAY 21, 1986

ST PM 1 PIONEER PRESS DISPATCH

Speech fees routed through publisher

By Dane Smith
Washington Correspondent

WASHINGTON — Sen. Dave Durenberger, R-Minn., may have found a way to indirectly, and legally, circumvent the Senate's limit on fees for speeches to special interest groups and other audiences.

Durenberger reported receiving \$21,500 in so-called "honoraria" last year, \$16,000 of it from health-related groups eager to listen to the influential chairman of the Senate Finance Committee's subcommittee. His total came close to the \$22,500 limit, 20 percent of a senator's \$75,000 salary, imposed by Senate rules.

In addition, other groups — including other health-related groups — paid \$10,000 to hear Durenberger speak. But they didn't pay the senator himself; instead, the money went to the publisher of his books.

And in return for those "promotional appearances" — and the exclusive right to print Durenberger's books, which have sold 400 copies in two years — the publisher paid Durenberger \$38,375.

Added to his interest group honoraria, the arrangement enabled Durenberger to report \$59,875 in outside income last year.

Durenberger said he requested and received approval by the Federal Election Commission — the agency designated by Senate rules to define what constitutes an "honorarium" — and that his only intention was to promote his ideas while earning a little extra money.

Acknowledging that the deal is unusual and that critics "could say" that Durenberger found a big loophole, the senator added, "I am not trying to get around honoraria limitations."



Sen. Dave Durenberger
Promoting books pays off

Durenberger's publisher is Pirahna Press Inc., a Minneapolis company owned by Gary Diamond, a friend and longtime political supporter of Durenberger. Diamond, who is under no obligation to disclose details, revealed the amount received for the "book promotion" speeches but said he didn't know how many speeches were made or what groups were involved.

However, Durenberger's attorney, Michael Mahoney, acknowledged that at least some of the speeches were to groups in the health field. He declines to provide additional details.

Pirahna has published two paperback books under Durenberger's name at an estimated printing cost of at least \$75,000, Diamond said. The first, "Neither Madmen Nor Messiahs," is an essay on national security policy and has sold 1,800 of the 12,000 copies printed. The second, just published, is a collection of 44 Durenberger speeches about the health care system.

Income from Durenberger's "book promotion" speeches represented about half of Pirahna's total \$20,000 income from the Durenberger account in 1985, Diamond said.

Randy Huwa, a spokesman for Common Cause, a self-described citizens' watchdog group, said the arrangement "certainly strains the limit" of the rule intended to restrict special interest groups from giving to the "direct benefit of a member of Congress."

Bonnie Parker, staff director for the Select Committee on Ethics, said the deal was "unusual" but that the committee had issued no formal ruling on it.

However, FEC officials said the payment apparently is a legal "stipend," or fixed payment, for services to the publisher. Payments for books, unlike those for articles and speeches, are not considered honoraria under Senate rules.

In October 1984, Durenberger's attorneys sent a letter to the FEC asking if a deal involving "promotional appearances" for the publisher would violate the honoraria limits that took effect in 1984.

Durenberger, a man of modest means who has commented about the difficulty of living the life of a senator on a \$73,100 salary, was a prolific speech-maker before the limits were imposed. He ranked fourth in the Senate in honoraria income in 1983, collecting \$92,756. Since then, he has added the chairmanship of the Select Committee on Intelligence to his health subcommittee chairmanship.

The lawyers' letter asking FEC advice did not disclose the amount of the payments for Durenberger's "promotional appearances." Nor did it spell out that the promotions amounted to paid speaking engagements that benefited the publisher.

FEC Chairman J. Ann Elliot issued an opinion two months later based strictly on the information in the attorneys' letter, which found that the payments "would not be viewed as honoraria."

Told of the nature of the promotions, FEC assistant press officer Sharon Snyder said, "I don't think that legally changes the fact that he is getting a stipend (a fixed amount) and not an honoraria. He is performing services for the company and has a contract with the publisher."

Mahoney said the definition of honoraria in the law is "a carefully defined area." He said "everything else (outside that strict definition) isn't a loophole, it's an area that was there all along."

Much of the research and writing in both books was done by members of Durenberger's Senate staff. The book on defense policy essentially consists of two "white papers" on defense and arms control prepared by legislative aide Stephen Ockenden, to whom the book is dedicated.

Doyle acknowledged that the book contained research by Senate aides, but that Durenberger relies on ghost writers and speech writers than many other senators.

"Do you really think Ted Kennedy or Gary Hart write everything that is in their books?" she asked.

Durenberger's supporters point to more than 20 reported millionaires in the Senate, some of whom continue to make money from outside business pursuits that could present a conflict of interest.

His press secretary, Karen Doyle, noted that senators such as Gary Hart, D-Colo., and Danie Patrick Moynihan, D-N.Y., have earned considerable outside income from publishing books.

"Durenberger is pure, compare to everybody else," Diamond said. "He's got to make a living, and everybody says it's OK, why not him?"

ATTACHMENT 7

RANDALL E. JOHNSON

Attorney-at-Law

-- 3700 W. 104th STREET
BLOOMINGTON, MINNESOTA 55431
(612) 835-2651

ADMITTED IN
MINNESOTA AND
DISTRICT OF COLUMBIA

December 29, 1983

The Honorable Dave Durenberger
1020 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402

PRIVILEGED & CONFIDENTIAL

Dear Dave:

This letter addresses a number of matters -- legal, political and personal.

1. Enclosed is the bill for \$63.75 for my out-of-pocket expenses in connection with obtaining a duplicate Certificate of Title for your condominium. As I told Lori Krage, if you write the check before the end of this year and if you go ahead with the transaction with Roger Scherer, this is deductible for 1983 as a business expense. It is not a campaign expense.
2. It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the partnership transaction and the allocations proposed by Dick Langlais, but he is your income tax specialist. In any event, from the standpoint of Senate Rules and IRS Regulations, I believe you can claim the per diem reimbursement -- but the paperwork on this should be completed immediately if you have not done so already. Everything should be dated before August 1st, reflecting the oral agreement between you and Roger.

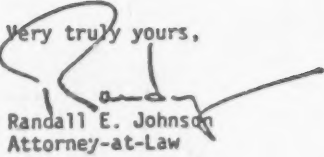
Page 2
The Honorable Dave Durenberger
December 29, 1983

4.

Page 3
The Honorable Dave Durenberger
December 29, 1983- . . .

Best wishes for a happy new year.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Randy", with a long horizontal stroke extending to the right.

Randall E. Johnson
Attorney-at-Law

REJ/lw/A085

ATTACHMENT 8

DAVE DURENBERGER

Attached to September 8,
1989 letter from Paul
Overgaard, S.C. Ex. 300.

Mike,
This is
rather upsetting
to me. Please
call me this
weekend at
370-3382 or
338-0233. Paul

NOT PRINTED AT GOVERNMENT EXPENSE

ATTACHMENT 9**U. S. CAPITOL BUILDING**

the preceding 5 years, and each State acreage allotment is apportioned to individual farms in the State.

Under H.R. 11990, the national marketing quota would be converted into a national acreage allotment by dividing the national quota by the national average yield during the preceding 5 years. The national acreage allotment less a reserve not to exceed 1 percent for making corrections, adjusting inequities and for establishing allotments for "new" tobacco farms would then be apportioned among individual farms on the basis of the past farm acreage allotments, past plantings, and other factors.

To illustrate, 288,000 farms in 435 counties in 14 States have burley tobacco allotments. Records must be maintained, and reports compiled to determine the normal production of the acreage diverted under our various programs on each farm. Also, determinations must be made as to what adjustments are needed to correct for abnormal conditions of production, for small farms, for trends in production and for seedbed and other plant disease. All of this paperwork would be eliminated under H.R. 11990 and all farm allotments for the preceding year would be increased or decreased by applying a uniform national factor.

In summary, H.R. 11990 doesn't change any basic provisions of the acreage allotment program. It merely eliminates a lot of unnecessary paperwork. The resulting farm allotments will be the same under either system.

**U. S. CAPITOL BUILDING AND GROUNDS—USE,
SAFETY AND ORDER**

P.L. 90-108, see page 309

**Senate Report (Public Works Committee) No. 573,
Sept. 28, 1967 [To accompany S. 2310]**

**House Report (Public Works Committee) No. 745,
Oct. 9, 1967 [To accompany H.R. 13178]**

Cong. Record Vol. 113 (1967)

DATES OF CONSIDERATION AND PASSAGE

Senate Oct. 5, 19, 1967

House Oct. 19, 1967

The Senate bill was passed in lieu of the House bill after substituting for its language the text of the House bill. The House Report is set out.

HOUSE REPORT NO. 745

THE Committee on Public Works, to whom was referred the bill (H.R. 13178) to provide more effectively for the regulation of the use of, and

LEGISLATIVE HISTORY

for the preservation of safety and order within, the U. S. Capitol Buildings and the U. S. Capitol Grounds, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

INTRODUCTION

Until recently, the act of July 31, 1946, together with the existing general laws of the United States and of the District of Columbia, appeared to be sufficient to cope with the occasional breach of the peace which occurred on the Capitol Grounds or within the Capitol Buildings. However, in the past few years there has been a substantial increase in the number of incidents of excessive disruption or disorderly conduct.

Without examining the reasons for this rise in disruptive activity, it may be noted that Congress has had before it legislation which brings into focus the extremely frustrating and difficult issues confronting the Nation. These are by their very nature issues on which people have strong views. Many people have grown impatient with the delays inherent in seeking workable solutions to these problems, if not with the proposals for solving them.

The Committee on Public Works has given full recognition to the need to provide every legitimate opportunity for the public expression of dissenting views in a reasonable and proper fashion. The committee also has given consideration to the need to provide and maintain necessary safeguards for protecting the conduct of public business in the Federal Legislature.

The committee at all times sought to accommodate these sometimes conflicting goals in such a way as to insure to every individual or group of individuals the guarantees to which the Constitution of the United States entitles them, while at the same time protecting the integrity of the legislative process. H.R. 13178 prohibits activities which the committee strongly believes are not those which any reasonable person could consider as falling within the guarantees of the first amendment. The committee exercised great caution and gave careful attention to the need for legislative constraint in this matter. The nature of the legislative process, and the problems which now confront us as a Nation, are such that people with strong feelings must be assured of the rights of freedom of expression and of assembly and the right to petition their Government, but under no circumstances should the guarantee of these rights be extended to a license for a minority to delay, impede, or otherwise disrupt the orderly processes of the legislature which represents all Americans.

COMMITTEE AMENDMENTS

The amendments adopted by the committee are three in number. The first adds the words "and knowingly" after the word "willfully" on page 3, line 2, of the reported bill. The purpose of this addition is to make it quite clear that the provisions of this subsection do not apply to an individual or a group of individuals who, either by accident or without intent to violate these provisions, do any of the acts which are prohibited by the reported bill.

U. S. CAPITOL BUILDING

The second amendment adopted by the committee is on page 5, line 18. The word "shall" is stricken and "may" is substituted therefor. Testimony presented to the committee by the U. S. attorney for the District of Columbia indicated the need for this change from "shall" to "may". The bill as introduced containing the word "shall" made it mandatory that all misdemeanors be prosecuted in the court of general sessions in the District of Columbia. Under existing law in the District of Columbia, both the Federal District Court of the United States and the court of general sessions in the District of Columbia have jurisdiction insofar as misdemeanors are concerned. Thus, a prosecution for a misdemeanor which occurs in the District of Columbia may be brought in either the Federal District Court of the United States or the court of general sessions of the District of Columbia. The U. S. attorney for the District of Columbia felt that if the word "shall" was kept in the law it would impose a hardship on the prosecution of many cases arising out of a similar set of facts where both felonies and misdemeanors had been committed. He would be obligated to bring one part of the prosecution for the felony in the Federal district court and the other part, arising out of the same set of facts, for a misdemeanor in the court of general sessions. This appeared to the U. S. attorney to be an unwieldy manner in which to prosecute cases such as these, and the committee concurred with his position. The committee, therefore, struck out the word "shall" and substituted in lieu thereof the word "may", giving the U. S. attorney for the District of Columbia the latitude, if he so desires, to bring an action both for a felony and a misdemeanor arising out of the same set of facts in the U. S. District Court for the District of Columbia or, if he so desires, to prosecute the misdemeanor in the District of Columbia court of general sessions.

The third amendment strikes out lines 1 and 2 on page 6 of H.R. 13178 as introduced. The bill, as introduced, repeals the proviso contained in section 12 of the act of July 31, 1946. This would have withdrawn from the Capitol Police Board authority to grant the Commissioners of the District of Columbia the right to permit the use of Louisiana Avenue for certain parades, processions, and the display of certain flags, banners, or devices. The committee amendment strikes out this repeal, thus retaining this authority in the Capitol Police Board.

STATEMENT OF THE PROBLEM

The problem of the security of the Capitol Buildings was raised in two recent decisions by the U. S. Court of Appeals for the District of Columbia. These decisions highlight the confusion surrounding the existing laws, their implementation and their administration. At the present time a number of statutes enacted since 1892 are applicable depending on the circumstances of the disorder which may occur on the Capitol Grounds or in the Capitol Buildings.

The act of July 31, 1946, regulates the use of the Capitol Grounds—but by the specific terms of section 16 of that act it does not apply to conduct within the buildings on these grounds.

The act of July 29, 1892, provided for a fine for those found guilty of unlawful conduct in the public buildings of the United States located

LEGISLATIVE HISTORY

within the District of Columbia. The penalty for violation of the 1892 statute more commonly referred to as section 3111 of title 22 of the District Code, is a fine of not more than \$50. At the time of its enactment, that was twice the penalty for similar conduct anywhere else in the District of Columbia, but, as times have changed and other laws have been amended to recognize the need for updating and revising penalties, this statute has apparently been overlooked.

Two recent decisions, *Feeley v. District of Columbia*, decided by the U. S. Court of Appeals for the District of Columbia on March 22, 1967, and *Smith et al. v. District of Columbia*, decided by the same court on July 27, 1967 (the full text of decisions referred to are printed in the appendix of this report), have made it apparent that the general statutes applicable to disorderly conduct in the District of Columbia do not apply to such conduct on the Capitol Grounds or in the Capitol Buildings. Thus, there is created the anomaly that while disorderly conduct in the Capitol may be subject to a fine of not more than \$50, the same offense in any other place in the District of Columbia can be penalized by a fine of up to \$250 or imprisonment for not more than 90 days or both. In addition, the two decisions show that the prosecution of cases involving the Capitol is pursued not by the U. S. attorney but by the Office of the Corporation Counsel of the District of Columbia.

It is, therefore, necessary for the Congress to revise the statutes relating to improper conduct in the Capitol Buildings. The court of appeals concluded its opinion in the *Smith* case by saying "these appellants were entitled to know with certainty the offense with which they were charged and the possible penalty threatened. Under the circumstances they were entitled to a definite reference to the law which they had allegedly violated. In view of the confusion apparent in the enforcement of these and related statutes we commend to executive and legislative authorities a review of this entire area of the law."

SCOPE OF LEGISLATION

H.R. 13178 amends the act of July 31, 1946, by thoroughly revising section 6 of that act, and by making it clear that the offenses enumerated and prohibited therein apply with equal force in the Capitol Buildings as well as on the Capitol Grounds. As presently written, section 6 of that act, otherwise known as 40 U.S.C. 193f, provides:

Sec. 6. It is forbidden to discharge any firearm, firework or explosive, set fire to any combustible, make any language or oration, or utter loud, threatening, or abusive language in said United States Capitol Grounds.

In the revised section 6, the prohibited actions are divided into (1) a felony category, covering the carrying, discharge, or transportation of weapons and explosives on the Capitol Grounds or in the Capitol Buildings and knowingly and with force and violence entering and remaining upon the floor of either House of Congress; and (2) a misdemeanor category covering a wide range of disruptive or disorderly conduct. The penalty for felonious activities would subject the perpetrator to a fine of not more than \$5,000 or imprisonment for not more than 5 years or both. The pen-

U. S. CAPITOL BUILDING

alty for engaging in any of the other prohibited acts would be a fine of not more than \$500 or imprisonment for not more than 6 months or both.

In light of the aforementioned court decisions, H.R. 13178 specifically provides that where the conduct described in this act also violates the general laws of the United States or the laws of the District of Columbia, this act does not foreclose the prosecution from using those other criminal sanctions. Responsibility for prosecuting violations under H.R. 13178 would lie with the U. S. attorney for the District of Columbia.

SECTION-BY-SECTION ANALYSIS

Subsection (a) of the first section of H.R. 13178 amends 40 U.S.C. 193a and the corresponding portion of the District of Columbia Code, 9-118, by defining the Capitol Grounds to include all additions to those grounds subsequent to June 25, 1946.

Subsection (b) of section 1 amends 40 U.S.C. 193f and D.C.Code 9-123 by providing "that except as authorized by regulations promulgated by the Capitol Police Board no one may: (A) carry any firearm, dangerous weapon, explosive, or incendiary device; (B) discharge any firearm or explosive, use any dangerous weapon, or ignite any incendiary device; or (C) transport by any means any explosive or incendiary device."

The activities proscribed by paragraphs (A), (B), and (C) relate to both the Capitol Grounds and the Capitol Buildings.

It will be necessary for the Capitol Police Board to develop a list of incendiary devices which are prohibited.

In this connection, the committee requested the views of the U. S. attorney for the District of Columbia on possible definitions of this term. He submitted several, and the committee recommends to the Capitol Police Board the following definition for inclusion in its regulations:

the term "incendiary device" means any substance, material, or item, or any combination thereof (including, but not limited to, spontaneously inflammable, oxidizing, thermal, metallic, and modified oil mixtures), capable of igniting other materials by means of combustion, explosion, intense heat, or otherwise, but does not include ordinary matches, flint and steel lighters, or gas lighters intended primarily for personal or household use.

All of the other terms—"firearms," "dangerous weapons," and "explosives"—are specifically defined elsewhere in this bill.

Subsection (b) of the first section further amends existing law by making forceable and violent entry upon the floor of either House a felony. The description of specific felonies set out in the revision of section 6 does not preclude prosecution under the existing or future felony statutes of the United States or the District of Columbia for acts not enumerated herein. The laws relating to murder, arson, assaulting a police officer and the like will continue to be applicable upon the Capitol Grounds and in the Capitol Buildings.

Subsection (b) of the first section of H.R. 13178 further amends 40 U.S.C. 193f and D.C.Code 9-123 by adding a new subsection (b) to section 6 of the act of July 31, 1946. This subsection is a seven-part proscription of activi-

LEGISLATIVE HISTORY

ties which would subject the perpetrator thereof to misdemeanor prosecution.

Under the terms of this new language, it is unlawful for any person or group of persons willfully and knowingly—

(1) To enter or remain upon the floor of either House, the cloak-room, lobbies adjacent to such places, or the Rayburn Room of the House, or the Marble Room of the Senate unless such person is authorized to do so under rules or authority given by either House. The inclusion of the words "willfully and knowingly" would protect against prosecutions for actions by persons not intending to violate these provisions. The actions involved in this misdemeanor differ from the actions proscribed under subparagraph (2) of new subsection 6(a) in that the felony created therein requires knowledge and force and violence and is designed to prohibit actions which would endanger the Members of the House or the Senate, or which would threaten physical harm to them, or which would impede or disrupt the proceedings of either the House or the Senate;

(2) To enter or remain in the gallery of either House in violation of the rules governing admission or conduct therein;

(3) To enter or remain in any room within any of the Capitol Buildings which have been set aside or designated for use by the House or Senate or any Member of either body or any committee, subcommittee, officer or employee, if the entry or remaining is with the intent to disrupt the orderly conduct of official business;

(4) To utter loud, threatening, or abusive language or to engage in any disruptive or disorderly conduct, on the Capitol Grounds or in the Capitol Buildings when such actions are intended to impede, disrupt, or disturb the orderly conduct of the public business of the United States. The proscription against loud, threatening or abusive language contained in subparagraph (4) is the only prohibition against speech contained in H.R. 13178. The purpose of this paragraph is to prohibit any conduct which would unreasonably and unnecessarily hinder the prosecution of legislative business. The activities proscribed by this paragraph will not be permitted anywhere on the Capitol Grounds or in the Capitol Buildings.

(5) To obstruct, or impede passage through or within, the grounds or buildings;

(6) To commit acts of physical violence; and

(7) To parade, demonstrate, or picket within the buildings.

Paragraphs (4), (5), (6), and (7) enumerate and describe conduct for which there is no justification. They would provide the Capitol Police with additional authority for handling those whose purpose it is to engage in mischief or cause trouble.

As used in subparagraph (5) the term "obstruct" means to render impassable without having to show unreasonable inconvenience or hazard. The term "impede" means to interfere with, set in the way of, or block. Everyone lawfully present on the Capitol Grounds or within the Capitol Buildings is entitled to free and unhampered passage along the walks, ways, passages, or halls.

U. S. CAPITOL BUILDING

The phrase "act of physical violence" is defined in subsection (d) of section 1 of H.R. 13178.

Subsection (b) of H.R. 13178 further amends existing law by providing that the proscriptions contained therein do not apply to Members of Congress, their employees, or the officers or employees of the Congress or any committee or subcommittee thereof while they are engaged in the lawful discharge of their official duties.

Subsection (c) of the first section of H.R. 13178 revises 40 U.S.C. 193h and D.C.Code 9-125 by providing penalties to cover the acts delineated as wrongful in subsection (b) of the bill. Felonious conduct would subject the offender to a maximum fine of \$5,000 or imprisonment for up to 5 years or both. Misdemeanors as defined by the act, which include all of new section 6(b) and sections 2, 3, 4, 5, and 7 of the act of July 31, 1946, would involve a maximum penalty of \$500 or imprisonment for up to 6 months or both.

The bill would add language to section 8 of the act of July 31, 1946, to make it clear that prosecution may be had for attempting or conspiring to commit such offenses.

Prosecution for all cases arising under the act as amended by the reported bill would be by the U. S. attorney in the name of the United States. Any prosecution for a violation of this act could be joined with a prosecution for a violation of the general laws of the United States and the District of Columbia in a single action. Where the prosecution is for one of the enumerated felonies, the proceedings shall be in the U. S. District Court for the District of Columbia. All other violations may be tried in the District of Columbia court of general sessions, which is more properly set up for the handling of misdemeanor offenses.

The penalties provided for in this amendment are substantially greater than those contained in the 1946 act, which was \$100 or 60 days, and are far greater than those which can now be imposed if disorderly conduct occurs in public buildings, i. e., a fine of not more than \$50. One of the principal matters of concern of the committee has been that the penalty assessed under D.C.Code 22-3111 can be satisfied by the posting of \$10 collateral. The substantial difference between the penalty which may now be levied and that which is presently provided for is such that the committee does not believe that summary disposition of these cases will continue.

Subsection (d) of the first section of the reported bill amends section 16 of the act of July 31, 1946, 40 U.S.C. 193m, and D.C.Code 9-132, to specifically include the Capitol Buildings within the scope of the act. As defined, these buildings include all buildings situated upon the Capitol Grounds and all subways or enclosed passages connecting two or more of these buildings. The act of 1946 specifically excluded the Capitol Buildings from coverage.

Subsection (d) also defines the terms "firearm," "dangerous weapons," "explosive," and "act of physical violence."

Section 2 of the bill amends the 1892 statute, more commonly referred to as "D.C.Code 22-3111," by increasing the penalty for disorderly conduct in public buildings of the United States located in the District of Columbia from a fine of not more than \$50 to a fine of not more than \$500 or imprisonment for not more than 6 months or both.

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Section 3 of the reported bill insures that prosecutions for offenses committed prior to enactment of this act will be prosecuted under the then existing laws and that prosecutions for violations occurring after the enactment of this act will be pursuant to provisions of it.

COMMITTEE VIEWS

The committee believes that H.R. 13178 as amended by its specific enumeration of acts designed to impede, disrupt or disturb the orderly conduct of the Nation's business, will enable the Capitol Police to maintain safety and order by informing those intent upon such a course of action of the consequences of their actions. The committee believes it important that the Congress enact a statute proscribing disorderly and disruptive conduct within the Capitol Buildings and Grounds, rather than relying wholly upon the protection of the general laws of the United States or the District of Columbia.

The revision of subsection (a) of section 6 of the act of July 31, 1946, which is contained in this bill proscribes certain activities on the Capitol Grounds and in the Capitol Buildings and provides that violations thereof shall be punished as felonies. The Capitol Police Board is given the authority to make certain regulations with respect to these proscribed activities. The committee expects that the Capitol Police Board in the exercise of this regulatory authority will, to the extent appropriate, exempt Members of Congress from these provisions, as well as officers and members of the Armed Forces, National Guard, Secret Service, FBI, and other police officers engaged in the performance of their official duties.

Section 6(b) (1) of the act of July 31, 1946, as it is proposed to be amended by the reported bill, makes it unlawful for any person or group of persons willfully and knowingly to enter or remain on the floor of either House, or in any cloakroom or lobby adjacent to the floor, or to enter or remain in the Rayburn Room of the House or the Marble Room of the Senate unless that person is authorized to do so pursuant to rules adopted by that House or pursuant to authorization given by that House. It is the understanding of the committee that this does not proscribe any of the activities which have been traditionally carried on under the customs of both Houses as they apply to the presence in these places of officers and employees of the House, of committees and subcommittees thereof, and persons employed in the offices of Members.

The committee therefore recommends the enactment of this bill.

MINORITY VIEWS OF HON. JEROME R. WALDIE, OF CALIFORNIA

The instant bill is poorly drafted and quite likely unconstitutional in that it will be construed as being void for uncertainty.

Probably the most elementary constitutional principle involves the necessity of drafting laws creating crimes with great certainty.

Not even the proponents of this bill maintain that it is free of great ambiguities. Had the bill been considered by the Judiciary Committee there would undoubtedly have been amendments adopted that would have clarified

ATTACHMENT 10**The Washington Campus**

2620 P Street, N.W.
Washington, D.C. 20007

202 388 6411

61 other institutions
Arizona State University
University of Alabama-Birmingham
University of Alabama-Livestock
Clemson University
Cornell University
Georgetown University
Harvard University
Indiana University
The University of Michigan
The University of North Carolina
The University of South Carolina at Chapel Hill
The Ohio State University
Purdue University
The University of Texas at Austin

April 1, 1985

The Honorable Richard B. Cheney
United States Congressman
225 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Cheney:

Thank you very much for taking the time to speak to the executives from United Technologies two weeks ago, and to the executives from Hospital Corporation of America and Northeastern University last week. Your presentations, as always, were given the highest ratings by the participants, who greatly appreciated the sessions in your office and in the Capitol Building.

I am enclosing the honoraria for all presentations -- \$500 for each session. Again, we are grateful for your continued interest and contribution to Campus programs, and look forward to seeing you soon.

With best wishes,

Sincerely,

Terry R. Zack
Executive Director

TRZ/eas
Enclosure

ATTACHMENT 11

Pathology Practice Association

1225 Connecticut Ave., N.W.
Suite 303
Washington, D.C. 20036
(202) 659-0330

August 26, 1986

The Hon. David Durenberger
United States Senate
154 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Durenberger:

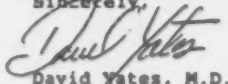
As you know, the prospective payment system and other reforms in government health care financing are changing the face of the nation's health care system. We would very much enjoy hearing your views and insights -- as an author and a chief congressional architect of these reforms -- at the annual meeting of the Pathology Practice Association, being held this year on Dec. 2-5 in San Francisco, California.

We invite you to be our luncheon speaker at noon on Friday, Dec. 5, at the Ramada Renaissance Hotel in San Francisco. We would be pleased to make arrangements for honorarium, first-class travel and lodgings.

The meeting is being sponsored jointly by the Pathology Practice Association (a nationwide organization) and the California Society of Pathologists. As hospital-based physicians covered by both Medicare Part A and Part B, pathologists have particular concerns regarding health care financing, such as reimbursement for clinical lab fees and the prospect of DRGs for hospital-based physicians. Your views on such issues, and on health care reform in general, would be welcome.

When you know whether this event will fit into your schedule, or if you need further information in the meantime, please contact Paul Johnson in Washington at 659-0330. I hope you can join us. I am certain our membership would find your remarks interesting and useful.

Sincerely,



David Yates, M.D.

cc: Doug Kelley

DAVID YATES, M.D.
President
STEPHEN SAUER, M.D.
Vice President
FREDERICK E. JOYCE, M.D.
Secretary/Treasurer
BRANHAM, ABRAHAM, M.D.
Board Member
GEORGE BRANHAM, M.D.
Board Member
ERLO ROSE, M.D.
Board Member
JOHN W. POFF, M.D.
Board Member
KIM KRISTENSEN, M.D.
Immediate Past President

ATTACHMENT 12

- 12 -

DECEMBER 3, 1986

— Remarks to the "Coping with Change: Rural America in Transition" conference in Minnesota s: TC

DECEMBER 5, 1986

#5KP Remarks to the Hospital Corporation of California in Monterey, CA c: Kerry Elliott re: what's happening in federal health care policy

#5KP Remarks to the Pathology Practice Association in San Francisco, CA c: Karen Doyne re: clinical lab fees/DRG's for hospital based physicians

— Remarks to the A.G.E. Luncheon at Stanford University in Palo Alto, CA c: Paul Hewitt re: A.G.E.

#2K1 *Remarks to representatives of Merritt Peratta Medical Center in Oakla*
 DECEMBER 8, 1986 *CA c: Wayne Thompson re: health issues*

Monterey — Panel discussion of the Council of State Governments Annual Meeting in Orlando **CANCELLED** re: changing state/federal role

DECEMBER 10, 1986

— Remarks to the A.G.E. Luncheon in Denver, Colorado c: Paul Hewitt re: A.G.E. **CANCELLED**

DECEMBER 11, 1986

— Remarks to the Health Future Foundation in Omaha, NE c: Chuch Monasee re: it's a full day health conference

Del

③ No

① H

② P

④ Other

STIPEND FOR 1986

TOTALS AS OF DECEMBER 31, 1986

\$131,000.00 Total earned from speeches given

Monthly Breakdown

January:	8 speeches given	Total earned:	\$20,000.00
February:	7 speeches given	Total earned:	\$17,000.00
March:	6 speeches given	Total earned:	\$11,500.00
April:	9 speeches given	Total earned:	\$17,500.00
May:	6 speeches given	Total earned:	\$12,000.00
June:	0 speeches given	Total earned:	\$-----
July:	3 speeches given	Total earned:	\$ 9,000.00
August:	4 speeches given	Total earned:	\$ 8,000.00
September:	5 speeches given	Total earned:	\$10,000.00
October:	2 speeches given	Total earned:	\$ 7,000.00
November:	3 speeches given	Total earned:	\$ 9,000.00
December:	2 speeches given	Total earned:	\$10,000.00
TOTALS:	55 speeches		\$131,000.00

SPEECHES

*Senators in
Address
Letter
1/2/86*

Remarks to a health luncheon in Puerto Rico c: Fred Graefe on January 2, 1986. Amount \$2.5K
Letter on file

Remarks to the American Medical Association in Palm Springs, CA c: Jackie Lycett (619)340-3911 on January 6, 1986. Amount \$5K
AMA paid Penny Duranberger's airfare to and from Palm Springs
Letter on file

Meeting with representatives of Lockheed Corp. in Burbank, CA c: George Kidd on January 6, 1986. Amount \$2K
Letter on file

Remarks to the Hospital Council of Southern California and to the Board members of Cedars-Sinai Medical Center in Los Angeles, CA c: Yoshi Honkawa (213)855-5701 on January 7, 1986. Amount \$2K and \$1K respectively.
Hospital Council paid Senator's flight from Palm Springs to Los Angeles

stipend 1986
page two

- ✓ Meeting with representatives of TRW in Los Angeles, CA c: Jack Carter on January 8, 1986. Amount \$2K
TRW paid Senator's flight from Los Angeles to Minneapolis and hotel expenses for 3 nights.
Letter on file

Senate Receptions

Breakfast discussion with representatives of the American Insurance Association in Washington, D.C. c: Mike Farrell on January 24, 1986. Amount \$1.5K

Remarks to Financial Executives Institute Meeting in Washington, D.C. c: Mike Quaranta on January 30, 1986. Amount \$2K

- Remarks to Center for Economic Policy Research at Stanford University at Palo Alto, CA c: Michael Boskin on January 31, 1986. Amount \$2K (\$8K to AGE/AGE covered all expenses)

Remarks to the American Hospital Association in Washington, D.C. c: Patti Goldman on February 3, 1986. Amount \$2K

Remarks to the National Association of Alcoholism Treatment Programs in Washington, D.C. c: Fred Graefe on February 5, 1986. Amount \$2K
Letter on file

Recess 2/7-17

- ✓ Remarks to the American Association of Equipment Lessors in Palm Springs, CA c: John Windburn on February 17, 1986. Amount \$5K
AAEL paid all Senator's expenses
Letter on file

Remarks to the Invest to Compete Alliance in Washington, D.C. on c: Jeanne Campbell on February 1986. Amount \$2K

- ✓ Remarks to the American Medical Association in Chicago, IL c: Michael Schick on February 21, 1986. Amount \$2K
AMA paid Senator's airfare from Washington to Chicago to Minneapolis
Letter on file

Remarks to the "Ad Hoc Committee for Western Utilities" in Washington, D.C. c: Clyde Wheeler on February 26, 1986. Amount \$2K
Letter on file

Dates of travel
4/30 - 1/31
2/21 to 2/26

Dates of travel
2/15 - 2/26

Dates of travel
2/21/86 Friday

stipend 1986
page three

unw 6-2
Remarks to the Homebuilders Association in Tucson, AZ
c: John Barnes on February 28, 1986. Amount \$2K
Homebuilders Association paid the Senator's airfare from
Washington to Tucson to Phoenix to Boston and hotel expenses for
one night

*Date of travel
4/28 Friday
3/3 Mon*

Remarks to the Securities Industry Association in Washington,
D.C. c: Stephan Small on March 4, 1986. Amount \$2K
Letter on file

Remarks to the National Association of Bond Lawyers in
Washington, D.C. c: Theodore Hester on March 4, 1986. Amount
\$2K
Letter on file

Remarks to the Council of Industrial Development Bond Issuers in
Washington, D.C. c: Ken Kirk on March 11, 1986. Amount \$2K
Letter on file

Remarks to the "Policy & Politics Medical Rehabilitation in the
Next Decade" conference sponsored by Capitol Associates, Inc. in
Washington, D.C. on March 18, 1986 c: Debbie Hardy. Amount \$2K
Letter on file

Remarks to Owens Illinois top officers in Washington, D.C. on
March 18, 1986 c: Bea Bleicher. Amount \$2K
Letter on file

Remarks to the Association of Metropolitan Water Agencies in
Washington, D.C. on March 21, 1986 c: Ken Kirk. Amount \$1.5K
Letter on file

Rec'd 4/27-4/28

Remarks to the Chicago Council on Foreign Relations in Chicago,
IL c: Clark Andersen on April 4, 1986. Amount \$1K

*Date of travel
4/4 trips to Chi.
2/3 trip to D.C.*

Remarks to the American Podiatric Medical Association in Chicago,
IL c: John Carlson on April 5, 1986. Amount \$2K
APMA paid the Senator's airfare from Minneapolis to Chicago to
Washington
Letter on file

Remarks to the Health Industry Distributors Association in
Washington, D.C. c: Bob Wilbur on April 7, 1986. Amount \$2.5K
Letter on file

stipend 1986
page four

Remarks to the National Grocers Association in Washington, D.C.
c: Dick Bolger on April 7, 1986. Amount \$2K
Letter on file

Remarks to the American Protestant Health Association in
Washington, D.C. c: Fred Graefe on April 16, 1986. Amount \$2K
Letter on file

Remarks to the National Association of Container Distributors in
Washington, D.C. c: John Slater on April 17, 1986. Amount \$2K
Letter on file

Breakfast discussion with Finley, Kumble, Wagner law firm in
Washington, D.C. c: Fred Graefe on April 25, 1986. Amount \$2K
Letter on file

Breakfast discussion with Williams & Jensen law firm in
Washington, D.C. c: Kathy Burke on April 29, 1986. Amount \$2K
Letter on file

Remarks to Duffy Wall & Associates in Washington, D.C. c: Duffy
Wall on April 30, 1986. Amount \$2K
Letter on file

✓ Remarks to Prudential-Bache in Bermuda c: Tom O'Hara on May 3, 1986. Amount \$2K
Senator travelled on a private plane to and from Bermuda with Tom O'Hara. Prudential paid hotel expenses for two nights

*Original 11/85
5/2 Friday 1986
5/4 + DC
5/4 DC to B. 11*

Remarks to the Washington Discussion Group in Washington, D.C. on
c: Caroline Fitzsimmons on May 8, 1986. Amount \$2K
Letter on file

Remarks to the Washington Representatives Breakfast in
Washington, D.C. c: Paula Tranfaglia on May 14, 1986. Amount
\$2K
Letter on file

*Revised
5/26 to 6/2*

stipend 1986
page five

- Remarks to the Midwest Pension Conference in Chicago, IL
c: Peter Kelley on May 19, 1986. Amount \$2K (The Midwest Pension Conference paid the Senator's airfare from Washington to Minneapolis to Chicago to Washington)

Date of travel
5/19 Mpls to Univ
speech
1 hr 5/19 Chgo
DC

Remarks to the American International Automobilers Association in Washington, D.C. c: Bill Kendall on May 20, 1986. Amount \$2K.

Remarks to the Montgomery County Medical Society Annual Meeting in Bethesda, MD c: Harold Frye on May 20, 1986. Amount \$2K
Letter on file

- ✓ Remarks to the Outpatient Ophthalmic Surgery Society Annual Meeting in San Diego, CA c: Mike Romansky on July 19, 1986. Amount \$5K. All expenses paid
Letter on file

Date of travel
7/18 - 7/20

- ✓ Remarks to Warner Lambert Co. in Morris Plains, NJ c: Brad Gary on July 21, 1986. Amount \$2K. Warner Lambert transported Senator by company jet from Boston to Morris Plains and paid airfare from Laguardia to Washington Dulles
Letter on file

Date of travel
7/21

Remarks to Equitable Life in Washington, D.C. c: Theresa Doyle on July 29, 1986. Amount \$2K

Remarks to the Fertilizer Institute in Washington, D.C.
c: Diane Bateman on August 5, 1986. Amount \$2K
Letter on file

Remarks to Pfizer representatives in Washington, D.C. c: Steve Conafay on August 12, 1986. Amount \$2K
Letter on file

Remarks to the American Society of Association Executives in Washington, D.C. c: Jack Ale on August 13, 1986. Amount \$2K
Letter on file

Remarks to the American Association of Nurse Anesthetists National Convention in Washington, D.C. c: Dick Verville on August 14, 1986. Amount \$2K

Recess
8/15 - 9/7

-000-

stipend 1986
page six

Remarks to the Council for Responsible Nutrition in Washington, D.C. c: Mart Cowan on September 10, 1986. Amount \$2K
Letter on file

Remarks to the clients of A.B. Laffer Associates in Washington, D.C. c: Wendy Constantino on September 16, 1986. Amount \$2K
Letter on file

Remarks to the American College of Cardiology Government Relations Committee in Washington, D.C. c: Beth Prichard on September 17, 1986. Amount \$2K
Letter on file

Remarks to the National Association of Senior Living Industries in Washington, D.C. c: Fred Graefe on September 25, 1986. Amount \$1K
Letter on file

Remarks to the American Banker's Association in Washington, D.C. c: Nina Gross on September 26, 1986. Amount \$2K

Remarks to 300 General Electric Managers in Washington, D.C. c: Phil Peter on September 30, 1986. Amount \$2K

Remarks to the Renewable Fuels National Conference on Alcohol Fuels in Washington, D.C. c: Eric Vaughn on October 1, 1986. Amount \$2K

✓ Remarks to the U.S. Health Corporation of Ohio in Columbus, OH c: Anne Klie on October 11, 1986. Amount \$5K
The U.S. Health Corporation of Ohio paid airfare from Washington to Columbus to Chicago to Minneapolis, hotel expense for one night, and ground transportation
Letter on file

*Dates of
travel
10/10 to 10/11
10/11 to 10/12*

*Recess Sine Die
10/17/86*

stipend 1986
page seven

✓Remarks to the Health America Corporation in Atlanta, GA *Dates of travel*
c: Sandy Mayson on November 14, 1986. Amount \$5K *11/14/86*
The Health America Corporation paid airfare expense from
Minneapolis to Atlanta to Washington

Remarks to the National Rural Electric Association in Washington,
D.C. c: Rob Lively on November 18, 1986. Amount \$2K

✓Remarks to the American Group Practice Association in Boston, MA *Dates of travel*
c: Don Fisher on November 20, 1986. Amount \$2K.
The American Group Practice Association paid airfare from Chicago
to Boston to Washington, hotel expense for one night, and ground *11/19-20,*
transportation
Letter on file

✓Remarks to the Hospital Corporation of California in Monterey, CA
c: Kerry Elliott on December 5, 1986. Amount \$5K.
The Hospital Corporation of CA paid airfare from Washington to
San Francisco to Monterey, hotel expense for one night, ground
transportation, and the cost of a private jet from Monterey to *Dates of travel*
San Francisco *12/4-7/8*

✓Remarks to the Pathology Practice Association in San Francisco, CA *12/4-7/8*
c: Karen Doyne on December 5, 1986. Amount \$5K.
The Pathology Practice Association paid for airfare from San
Francisco to Minneapolis to Washington and ground transportation
in San Francisco

ATTACHMENT 13

SCHEDULING INFORMATION

Speech 12/5/86 12:00 noon
 TYPE OF EVENT EVENT DATE/TIME

Pathology Practice Association
 GROUP NAME

Contact David Yates / Karen Doyle
 Phone 659-0330
 Key People _____

Topic RE: clinical lab fees/DEG's for hospital
 based physicians

LOCATION OF EVENT San Francisco, CA
 Place Palma Renaissance Hotel
 Room _____
 Phone Number _____
 Directions _____

STAFFING

Briefing Memo _____
 Photo _____
 Speech _____

8/26/86

REQUEST DATE

SPONSORING

Group Size ~200
 Honorarium \$5K
 (amount)

Room Set-Up _____
 Introduction by _____
 Taped _____ Transcribed _____
 (y/n) (y/n)

FOLLOW-UP

Thanks Sent _____
 (date)
 Photo _____ Sent _____
 (y/n) (date)
 Photo to Media _____
 (date)
 Membership Lists
 Received _____
 (y/n)
 Computerized _____
 (y/n)
 Filed _____
 (y/n)
 Regret Sent _____
 Greeting Sent _____
 (y/n)

MISCELLANEOUS

TO: Tamara/Murphy 1/4
FROM: JUDI/DD

SCHEDULING INFORMATION

telecopied
10/23/86

CECH
TYPE OF EVENT

12/5/86 12:00 noon
EVENT DATE/TIME

Pathology Practice Association
GROUP NAME

Contact David Yates / Karen Doyle

Phone 202-659-0330

Key People _____

Group Size ~200

Bar/meal \$5K

(amount)

Room Set Up _____

Introduction by _____

Taped _____ Transcribed _____

(y/n)

FOLLOW-UP

Thanks Sent _____

(date)

Photo _____ Sent _____

(y/n)

(date)

Photo to Media _____

(date)

Membership Lists

Received _____

(y/n)

Computerized _____

(y/n)

Filed _____

(y/n)

Regret Sent _____

Greeting Sent _____

(y/n)

(Topic RE: clinical lab fees/D&G's for hospital based physicians

LOCATION OF EVENT San Francisco, CA

Place Paloma Renaissance Hotel

Room _____

Phone Number _____

Directions _____

APPENDING

Briefing Memo _____

Photo _____

Speech _____

(

8/26/86

REQUEST DATE

MISCELLANEOUS

Pathology Practice Association

1225 Connecticut Ave., N.W.
Suite 303
Washington, D.C. 20036
(202) 659-0330

August 26, 1986

The Hon. David Durenberger
United States Senate
154 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Durenberger:

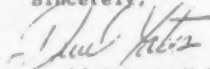
As you know, the prospective payment system and other reforms in government health care financing are changing the face of the nation's health care system. We would very much enjoy hearing your views and insights -- as an author and a chief congressional architect of these reforms -- ~~at the annual meeting of~~ the Pathology Practice Association, being held this year on Dec. 2-5 in San Francisco, California.

We invite you to be our luncheon speaker at noon on Friday, Dec. 5, at the Ramada Renaissance Hotel in San Francisco. We would be pleased to make arrangements for honorarium, first-class travel and lodgings.

The meeting is being sponsored jointly by the Pathology Practice Association (a nationwide organization) and the California Society of Pathologists. As hospital-based physicians covered by both Medicare Part A and Part B, pathologists have particular concerns regarding health care financing, such as reimbursement for clinical lab fees and the prospect of DRGs for hospital-based physicians. Your views on such issues, and on health care reform in general, would be welcome.

When you know whether this event will fit into your schedule, or if you need further information in the meantime, please contact Paul Johnson in Washington at 659-0330. I hope you can join us. I am certain our membership would find your remarks interesting and useful.

Sincerely,



David Yates, M.D.

cc: Doug Kelley

DAVID YATES, M.D.
President
STEPHEN BAUER, M.D.
Vice President
FREDERICK E. JOYCE, M.D.
Secretary/Treasurer
EMANUEL ABRAMS, M.D.
Board Member
GEORGE BRANAM, M.D.
Board Member
ERLO ROTH, M.D.
Board Member
JOHN W. PORT, M.D.
Board Member
KIM KRISTENSEN, M.D.
Immediate Past President

MEMORANDUM

TO: Senator

FROM: Jodi

DATE: September 30, 1986

RE: December Scheduling Requests

COPIES TO: Doug Kelley

ACTION: F.Y.I. but I also ~~want~~ to have a scheduling meeting before you leave to make decisions on these and others.

Senator - if you're in late tomorrow night could we take a few minutes to touch base on scheduling?

- * ~~Before your dinner tonight with Paul Hewitt~~ I need to fill you in on a couple of scheduling requests for December. Paul will be mentioning a possible A.G.E. meeting with Don Kennedy of Sanford. Don would like to schedule something at Sanford, or nearby, sometime before the end of this year.

I bring this up because when Paul approached me regarding Don Kennedy and a possible date I told him that you did have two speech requests in the San Francisco area for Dec. 5th and if you were interested we could do all this in one trip.

The two speech requests are:

1. Remarks to the Pathology Practice Association in San Francisco (this is the group Karen Doyne represents)

Date: 12/5/86- Time: 12:00 noon
 \$\$: 5K Group Size: 200
 Re: clinical lab fees/DRG's for hospital based physicians

2. Remarks to the Hospital Corporation of California in Monterey, Ca

Date: 12/5/86 Time: 12:00 noon
 \$\$: 5K Group Size: 200
 Re: what DD sees happening in federal health care policy

Monterey is approximately 2 hours driving time from San Francisco. It's 35 minutes by air and there are flights leaving every hour (four flights leave between 12:00noon and 1:00pm).

~~The speech requests are for the evening of Dec. 1 and the morning of the 2nd. I've also been in contact with Tim Conlan about the rural conference in Minnesota during this time period. He told me they were aiming for sometime between Dec. 2-4, but they only need a day and a half.~~

I was just given the information that you will be in Boston on the evening of Dec. 1 and the morning of the 2nd. I've also been in contact with Tim Conlan about the rural conference in Minnesota during this time period. He told me they were aiming for sometime between Dec. 2-4, but they only need a day and a half.

THANK YOU'S FOR CALIFORNIA TRIP:

HOSPITAL CORPORATION OF CENTRAL CALIFORNIA
5771 N. Fresno St., Suite 110
Fresno, CA 93710

1. J. Michael "Mike" Gallagher, President
2. Kerri Elliott - handled arrangements and got private plane
3. John Ferman, Sr. VP of the CA Assn. of Hospital & Health Systems - WAS HE ON THE PRIVATE PLANE TO SAN FRANCISCO?

PATHOLOGY PRACTICE ASSOCIATION
1225 Connecticut Ave., N.W., Suite 303
Washington, D.C. 20036

1. David Yates, M.D., President
2. Paul Johnson, Fleishman-Hillard, Inc. - picked you up at the airport
3. Karen Doyme - handled arrangements

A.G.E.

1. Donald Kennedy, President, Stanford University
2. Governor Richard Lamm
3. Paul Hewitt

MERRITT PERALTA MEDICAL CENTER
450 Thirtieth St.
Oakland, CA 94609

1. Wayne Thompson
2. Skip Huber, Chairman of the Board
3. Bob Albo - golf partner
4. Lee Emerson, President of Gilmore Steel, golf partner

OTHERS

Don McNeely - DID HE PICK YOU UP AT THE AIRPORT?

PLEASE WRITE "Sorry I couldn't make it" note to:

Governor Robert D. Orr, President of the Council of State Governments
Office of the Governor, Indianapolis, IN 46204-9797

FRIDAY, DECEMBER 5, 1986

8:40am OPTIONAL Press Conference

(K.J.D.)

9:00--am

Remarks to the Hospital Corporation of California at the Hyatt Regency Conference Center re: what DD sees happening in federal health care policy

10:00--am

Depart for the airport *they can provide private plane.*

10:30--am

Depart Monterey for San Francisco on United Airlines flight #3271

11:00--am

Arrive San Francisco - representative of the Pathology Practice Association to meet and drive to the Ramada Renaissance Hotel, 55 Cyril Magnin
phone: 415-392-8000*or Wayne Thompson can meet w/ him*

11:30--noon

Remarks to the Pathology Practice Association re: clinical lab fees/DRG's for hospital based physicians

12:15--pm

Depart for Stanford University in Palo Alto *Wayne Thompson can drive*

1:15--pm

Remarks to an A.G.E. Luncheon at Stanford University

2:30/3:00--pm

Luncheon to end/Wayne Thompson to drive to Merritt Peralta Medical Center, 450 30th St., Oakland
phone: 415-273-8139*Claremont City Club
5295 Broadway
Terrace
Oakland 94618*

4:30-5:30 Mtg w/rps of Merritt Peralta Medical Center

6-8--pm

3FC dinner hosted by Wayne Thompson at the Health Education Center, Merritt Peralta

Overnight at:

*Claremont City Club 415-655-4000 (main # ask for the HEC)
415-653-6789**Karen should call Tamara**DD must bring clothes**golf clubs tonight**Wayne 415-273-8139*

3A7-5385

ATTACHMENT 14

TO: Tan. by 11/11/86 1/4
FROM: JUD/AD

SCHEDULING INFORMATION

telecopied
10/23/86

Ceech

12/5/86 12:00 noon

TYPE OF EVENT

EVENT DATE/TIME

Pathology Practice Association

GROUP NAME

Contact

David Yates / Karen Dayne

Phone

202-659-0330

Key People

Group Size ~200

Hon.arium \$5K

Lam...

Room Set Up

Introduction by

Taped

Transcribed

(y/n)

y

FOLLOW-UP

Thanks Sent

(date)

Photo

Sent

(y/n)

(date)

Photo to Media

(date)

Membership Lists

Received

(y/n)

Computerized

(y/n)

Filed

(y/n)

Regret Sent

Greeting Sent

(y/n)

Topic RE: clinical lab fees/DEG's for hospital
based physicians

LOCATION OF EVENT

San Francisco, CA

Place

Renaissance Hotel

Room

Phone Number

Directions

BRIEFING

Briefing Memo

Photo

Speech

8/26/86

REQUEST DATE

MISCELLANEOUS

Pathology Practice Association

1225 Connecticut Ave., N.W.
Suite 303
Washington, D.C. 20036
(202) 659-0330

August 26, 1986

The Hon. David Durenberger
United States Senate
154 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Durenberger:

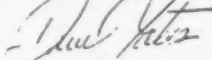
As you know, the prospective payment system and other reforms in government health care financing are changing the face of the nation's health care system. We would very much enjoy hearing your views and insights -- as an author and a chief congressional architect of these reforms -- at the annual meeting of the Pathology Practice Association, being held this year on Dec. 2-5 in San Francisco, California.

We invite you to be our luncheon speaker at noon on Friday, Dec. 5, at the Ramada Renaissance Hotel in San Francisco. We would be pleased to make arrangements for honorarium, first-class travel and lodgings.

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When you know whether this event will fit into your schedule, or if you need further information in the meantime, please contact Paul Johnson in Washington at 659-0330. I hope you can join us. I am certain our membership would find your remarks interesting and useful.

Sincerely,



David Yates, M.D.

cc: Doug Kelley

DAVID YATES, M.D.
President
STEPHEN BAUER, M.D.
Vice President
FREDERICK E. JOYCE, M.D.
Secretary/Treasurer
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Board Member
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Board Member
JOHN W. FORT, M.D.
Board Member
KAI KRISTENSEN, M.D.
Immediate Past President

ATTACHMENT 15

PIRANHA



PRESS

Gary L. Diamond
PublisherM E M O R A N D U M

TO: Ms. Karen Doyne
Pathology Practice Associates
1225 Connecticut Avenue NW
Suite 303
Washington, DC 20036

FROM: PIRANHA PRESS

DATE: OCTOBER 27, 1986

RE: SPEAKING ENGAGEMENT OF SENATOR DURENBERGER

We have received information from Senator Dave Durenberger's office that you have requested an appearance by him before your organization.

Senator Durenberger has entered into an exclusive arrangement with us under which we handle the arrangements for the sale and promotion of his books as well as his appearances. If you have not already been contacted, you will be contacted by the law firm which represents Senator Durenberger to review the terms of our arrangement with the Senator, the legal restraints, if any, and the fees and travel arrangements for his appearance.

If you have any questions, please contact Michael C. Mahoney Esq., at (612) 333-5411.

cc: Michael C. Mahoney, Esq.

.6 PHONE (612) 920-7711

4504 EXCELSIOR BLVD. - MINNEAPOLIS, MINN

ATTACHMENT 16

THE NATIONAL REAL ESTATE INVESTMENT FORUM
430 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS 60611-4091
(312) 670-6780

April 29, 1985

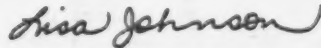
Mr. Gary Diamond
Piranha Press
4504 Excelsior Boulevard
Minneapolis, Minnesota 55416

Dear Mr. Diamond,

I have enclosed a check for \$2,000 made payable to Senator Dave Durenberger as an honorium for his luncheon address at our program, "The Regulators and You," which was held on April 19, 1985 in Washington, D.C. Ann Kelly, a member of his staff, asked me to forward the check to you.

If you have any questions, please do not hesitate to contact me at the telephone number listed on the above letterhead. Thank you for your attention.

Very truly yours,



Lisa B. Johnson
National Real Estate Investment Forum
Coordinator

Encl.



NATIONAL ASSOCIATION OF REALTORS • NO 132426
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April 26 - May 1, 1987

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Richard A. Thurtell

Richard C. Trouman

Diane Vannoy

Gabriel Vassily

George G. Weingart

Wendell E. Weiss

Laura A. Wilson

Peter Wright

December 13, 1985

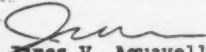
Mr. Gary Diamond, President
Piranha Press
4504 Excelsior Blvd.
Minneapolis, MN 55416

RE: Promotional Appearance - Senator David Durenberger
November 19, 1985 - Washington, DC

Dear Mr. Diamond:

Per your letter dated November 18, enclosed please
find an honorarium in the amount of \$2,000 for
Senator Durenberger's appearance.

Very truly yours,


James V. Aquavella, M.D.

JVA:ht
Encl.

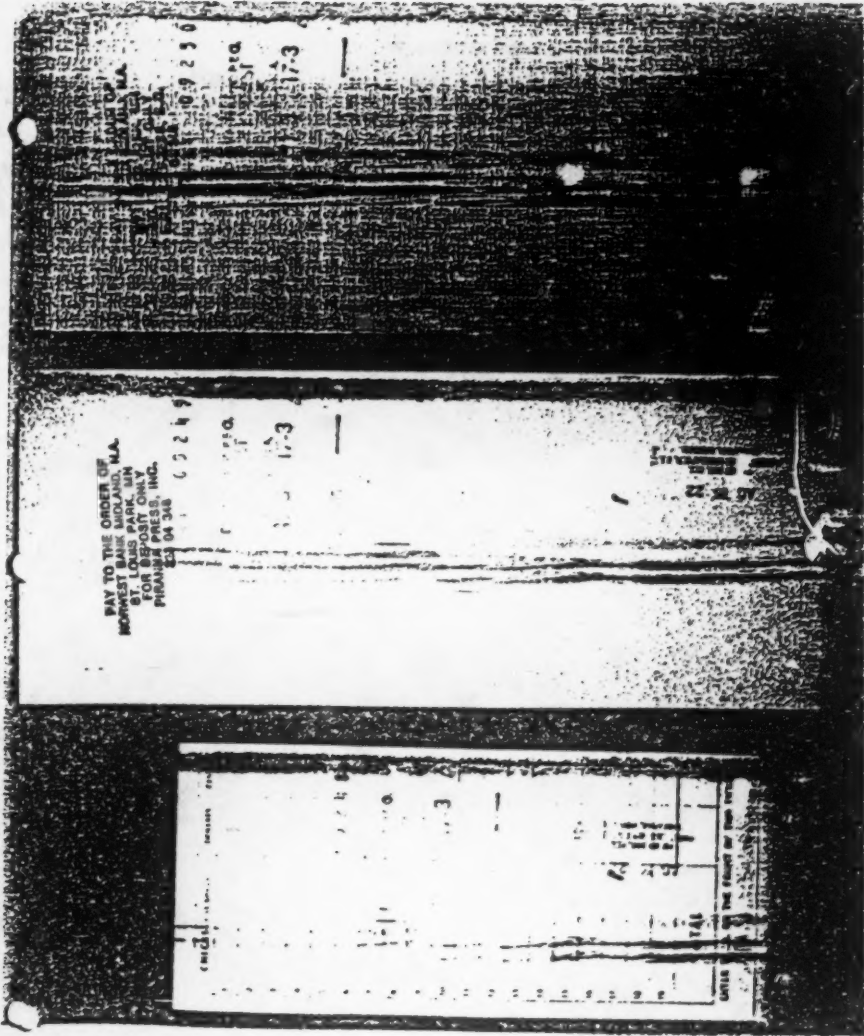
cc: Michael A. Lemp, M.D.

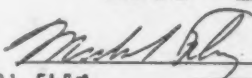
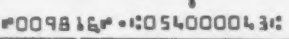
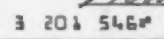
CASTROVIEJO SOCIETY WORLD CONGRESS ON THE CORNEA 878 WESTFALL ROAD ROCHESTER, NY 14618-2000		1005
<i>Check</i> <i>Check</i> <i>Senator David Durand</i> , 2000 <i>1/100</i> <i>Two thousand and 00/100</i>		<i>Dec - 12 1985</i>
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ATTACHMENT 17

CONFIDENTIAL

AFFIDAVIT OF DOUGLAS E. COE

DOUGLAS E. COE, being sworn, deposes and says:

1. I am an associate of the International Foundation with responsibility for coordination of Leadership Prayer Breakfast groups in parliaments around the world. I make this confidential affidavit in connection with the current proceedings before the United States Senate Select Committee on Ethics involving Senator David F. Durenberger.

2. Although I had met Dave Durenberger briefly before he first ran for the Senate in 1978, it is during his time in the Senate that I have come to know him well. He originally sought me out in 1984 for support during some difficult times. As spiritual guidance became more important in his life, we began to meet personally one morning each week in 1985-1986. We have become good friends and play golf and travel together. Our relationship encompasses both spiritual and personal concerns, and I have become intimately familiar with Dave's life and problems.

3. Dave has had tremendous tensions in his personal and family life. His first wife died of cancer leaving him with four young sons to raise. He later married

Penny, who tried to assume the role of mother to the boys. The problems inherent in these circumstances caused horrendous strain and led the family to the breaking point.

4. Dave's family situation was made worse by his very difficult work schedule. Since I have known Dave, he has always had a very strong commitment to his Senatorial duties. This often leads him to put work ahead of his family and other personal matters. In my experience, I too often have seen the expectations of a public position destroy personal lives.

5. From the time I first met Dave as a Senator, his sons were having drug and discipline problems. This was a source of great struggle in his marriage. Penny was upset that Dave was focusing most of his energies on his professional life and not setting discipline in the home. When she tried to set and enforce certain rules, the boys would take their problems to Dave who would often fail to support her in her efforts. This and other conflicts eventually led to a split in the home. Dave separated from Penny in February of 1985 and moved into The Cedars.

6. In addition to family and professional pressures, Dave was also experiencing financial difficulties. He had discussed with me how hard it was for him to maintain two homes, one in the Washington area and one in Minnesota. The drug problems of two of his sons were

severe enough to require periods of institutionalization and produced high medical expenses. Educational expenses for his sons and Penny were also a burden. I know that Dave was borrowing heavily and that his income from speaking was crucial in keeping him financially afloat. Nevertheless, I also know that he considered his Senate business and family concerns more pressing, and finances were never foremost in his mind.

7. During this difficult period when he was struggling in all the important areas of his life, Dave was not able to make good decisions. He seemed to lose his perspective, and his priorities became confused. He hit his lowest point during 1984-1985, and there were days when it was difficult for him to get out of bed in the morning.

8. It was during this low point that I and several of Dave's other friends tried to help him. We encouraged him to get the help of a marriage counselor, which he did beginning in May of 1985. The tough times also led him to seek strength in the Lord to help him through.

9. It was during this low point that Dave came to rely so heavily on others. He didn't have the time or energy to deal with all the details of his life; he had to conserve his resources to fulfill his Senatorial and family responsibilities. His frame of mind led him to trust others with too many of his business arrangements.

10. It is my understanding that Dave told his lawyers generally what he wanted to do about personal business and left the details to them. Because of his interests in health and other matters, Dave was very excited about his publishing opportunities. The very fact that he asked his attorney to make the arrangements indicates to me his desire to make everything legal. Nevertheless, I am certain that Dave was not spending time focusing on his condominium or book deals during this period; he was simply trying to keep his life together.

11. The basis of much of my interaction with Dave is my concern for the overall integrity of his life. As problems with his business arrangements appeared in the press, I would probe in my discussions with him, asking him if he was sure he was doing the right thing. My purpose was not to make his decisions, but to support him as a friend. Although I didn't necessarily agree with all Dave's decisions, I know of nothing to indicate that he ever intended to do anything improper. Dave and I have a very honest relationship. Because I am involved in so many other aspects of his life, I feel he would not try to deceive me about his business arrangements. I am convinced Dave did not think that anything was wrong with his book deal and seemed to be totally surprised when questions were raised.

12. I sincerely feel Dave is not a person to try to take advantage of people or to do things he knows are improper. I spend my life talking to public men, and I am convinced that Dave is not intentionally deceitful nor dishonest. However, Dave has not always made the best decisions. He has been naive and allowed himself to be put into bad situations when his personal problems caught up with him at home. But to me, to make a leap to thinking Dave has intentionally committed illegal or improper acts is unjust and simply wrong. Dave has made major mistakes, but fortunately he has been able to learn from those mistakes and is making great progress in his personal life now.

13. I would be glad to meet with members of the Committee or their staff if they have any questions I might be able to help with.

Douglas E. Coe

POST-HEARING MEMORANDUM OF
SENATOR DAVID F. DURENBERGER
TO SENATE SELECT COMMITTEE ON ETHICS

JULY 12, 1990

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United States Senate
DAVE DURENBERGER

July 12, 1990

CONFIDENTIAL

The Honorable Howell Heflin
Chairman
Select Committee on Ethics
Hart Senate Office Building, Room 220
Second and Constitution Avenue, N.W.
Washington, D.C. 20510-0425

The Honorable Warren Rudman
Vice Chairman
Select Committee on Ethics
Hart Senate Office Building, Room 220
Second and Constitution Avenue, N.W.
Washington, D.C. 20510-0425

Dear Howell and Warren:

At the close of the second day of hearings, the Vice Chairman invited me to submit a post-hearing brief simultaneously with Special Counsel's final report. I am eager to do so for several reasons.

First, I believe that Special Counsel's aggressive presentation of the case did not accurately portray the facts and indeed ignored much evidence that is exonerating. Our view of this record is presented in the attached memorandum. The factual statements there set forth are supported by copious quotations and citations from the record. As your colleague, I urge each Committee Member individually to review this memorandum carefully and compare it to the excessively negative version of the facts offered by Special Counsel.

Second, I believe the sanction and language Special Counsel recommends are much too onerous and perjorative. The sanction he recommends has a single

COMMITTEE ASSIGNMENTS:
FINANCE
ENVIRONMENT AND PUBLIC WORKS
LABOR AND HUMAN RESOURCES

Senators Heflin and Rudman
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precedent that does not fit. Only one Senator has been denounced -- Herman Talmadge. In that case there was criminal conduct in his office that, according to the Committee, he should have discovered and prevented. Not so here. Senator Talmadge also had not taken the multiple precautions I have taken -- obtaining advice from a variety of lawyers, the FEC, and two Senate Committees -- to ensure that he complied with all legal prescriptions.

I take full responsibility for my actions and recognize that some sanction may be appropriate, but not the one Special Counsel proffers. The sanction should comport with the actual offense. The one he recommends does not.

I particularly object to the characterization "reprehensible" that Special Counsel would use to brand my conduct. This word conjures up the impression of detestable, malicious conduct, but Special Counsel himself has ruled out such a finding. You, my colleagues, who know me know that this characterization just doesn't fit, that I am not venal or malicious.

I trust that, in considering a sanction, the Committee will take into account the already devastating effect on my life and career this investigation has had. The process has been a sanction in itself.

This matter began twenty-two months ago after a complaint was filed by partisans. Many of the basic facts had then been public for over two years and were known to this Committee. In the past twenty-two months, as the Committee has moved from stage to stage, I have been subjected to intense media scrutiny and criticism, often on the basis of erroneous or incomplete facts. It has been an excruciating ordeal.

Nonetheless, as the Chairman observed at the hearing, I have cooperated fully with the Committee's inquiries, even waiving my attorney client privilege. Indeed, much of the evidence Special Counsel presented came from my private files.

I am confident that our other 93 Senate colleagues -- public figures all -- understand the effect on me of this

Senators Heflin and Rudman
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Page 3

traumatic experience. I expect they all would have deep concerns -- particularly the other Members presently under scrutiny by this Committee -- if they thought the extended process followed in my case was a precedent for inquiries in the future. Members of this Committee have expressed their own misgivings. In any event, as I said the process I have endured has been a sanction in itself, one that surely will serve to deter other Members from questionable conduct.

Finally, I urge you not to adopt Special Counsel's suggestion that his report be adopted as the Committee's report. The Committee should view the evidence as a whole, not just those parts Special Counsel emphasizes, and also take into account my many other contributions to the Senate. This is not a Harrison Williams situation, where his corrupt intent and criminal conduct had been established by criminal proceedings and there was no need for the Committee to go much beyond Special Counsel's recitations. I firmly believe our other 93 colleagues expect each Member of this Committee to give his own, independent consideration to this matter and to submit to the full Senate a report that presents the Committee Members' own views, not just those of Special Counsel. I respectfully urge you to do just this.

Sincerely,

Dave Durenberger
United States Senator

VRG07103

CONFIDENTIAL

July 12, 1990

POST-HEARING MEMORANDUM OF
SENATOR DAVID F. DURENBERGER
TO SENATE SELECT COMMITTEE ON ETHICS

This memorandum responds to the invitation of Vice-Chairman Rudman, at the close of the second day of hearings, to submit a post-hearing brief simultaneously with Special Counsel's final report. Because the issues have been fully briefed and argued, we have chosen not to file a comprehensive brief that covers all subjects under investigation.^{1/} Rather, we present below:

- (1) a brief summary of our position as to the Piranha Press and condominium matters, and the unwarranted sanction and language recommended by Special Counsel,

^{1/}

We do, however, respectfully ask the Committee to review our earlier submissions and the transcript of our June 12-13, 1990 arguments before the Committee.

- (2) a more detailed analysis of the facts concerning the Piranha and condominium matters, buttressed by numerous excerpts from, or cites to, the evidence of record, particularly those affidavits we have submitted since the filing of our brief on May 16, 1990, and
- (3) a concluding section that argues again that the sanction and language Special Counsel recommends are inappropriate.

In both the summary and the more detailed analysis that follows, we call the Committee's attention to certain conclusions and factual statements by Special Counsel that are erroneous.^{2/} The fundamental conclusion is that there is no "clear and convincing evidence" that Senator

^{2/}

We can respond, of course, only to the comments made by Special Counsel at the June 12-13 hearing, the only public expression of his views. Special Counsel has not publicly submitted any written analysis about the Piranha and condominium issues. If Special Counsel privately has made other arguments, or submitted other authorities, to the Committee that the Members find persuasive, we believe it only fair that we be allowed to comment on them.

Durenberger engaged in conduct that requires the sanction Special Counsel recommends.^{3/}

SUMMARY

I. THE PIRANHA PRESS ARRANGEMENT WAS A GOOD FAITH VENTURE;
AS A MATTER OF LAW, THE HONORARIUM RULES HAVE NOT BEEN
VIOLATED

Contrary to Special Counsel's conclusion, the evidence does not demonstrate that Senator Durenberger selected Piranha Press to publish his books "to sanitize honorarium payments into something else." Rather, it was Gary Diamond, a well-known publisher of periodicals, who approached Senator Durenberger, a prolific speaker and writer, about publishing Neither Madmen Nor Messiahs. Diamond was interested in establishing a publishing company for political and historical books and in disseminating the

3/

"Generally, this phrase [clear and convincing proof] and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt." Black's Law Dictionary 227 (5th ed. 1979). The Supreme Court has said that the "clear, unequivocal and convincing evidence" standard is one "which does not leave the issue in doubt," a burden of proof that "is substantially identical with . . . proof beyond a reasonable doubt." Klapprott v. United States, 335 U.S. 601, 611 (1949); see also United States v. Riela, 337 F.2d 986, 988 (3d Cir. 1964).

Senator's views on defense and national security issues with which he agreed.^{4/}

Moreover, Special Counsel's contention ignores the undisputed fact that Piranha's publication of Neither Madmen Nor Messiahs was agreed to long before the agreement for Piranha appearances was conceived.

A. Reliance On Opinions From Lawyers And The FEC

After the book was published, Senator Durenberger obtained legal advice as to how he could earn income in connection with it. He relied upon his counsel -- Mike Mahoney and Donna Hanbery -- to structure an agreement with Piranha Press that was consistent with all relevant legal and regulatory requirements. Had counsel advised that the contemplated arrangement with Piranha was improper, the Senator would not have entered into it. His counsel also obtained an opinion from the FEC that the arrangement created a "stipendiary relationship" and that payments from Piranha would not be honoraria. Stipends are not unusual in

^{4/}

Various Senators and other public figures have praised the book as a serious and thought-provoking discussion of national security policy. Durenberger Exs. 40-52.

the Senate, as an examination of FEC Advisory Opinions will confirm.

Sworn testimony shows that the Senator's attorneys gave the FEC all the facts they considered relevant and that the FEC did not request more information, as was its legal obligation if the request for an advisory opinion was incomplete.^{5/} The Senator and his administrative assistant also consulted the staff of this Committee about the propriety of the arrangement and came away with the understanding that there was no problem if the FEC had blessed the arrangement.

B. Implementation Of The Contract

Senator Durenberger's lawyer, Mr. Mahoney, oversaw the implementation of the Piranha arrangement, acting also as Piranha's agent. While the administration of the contract was sloppy, several matters are clear.

- (1) The various parties acted in good faith, in accordance with their understanding of what the law and the FEC advisory opinion

^{5/}

See 11 C.F.R. § 112.1(d).

allowed. Indeed, even Special Counsel has not concluded that there was any specific intent to violate the honorarium rules.

- (2) Even if Senator Durenberger's conduct did not comport with the described in the FEC opinion, he nonetheless performed a "continuing service" for Piranha -- i.e., making appearances for which it was paid and helping establish it as a book publishing company, which was Mr. Diamond's primary goal.^{6/} The Senator was not separately compensated for individual appearances. Consequently, the income he received from Piranha, as a matter of law, must be considered a stipend and not honoraria. See FEC Advisory Opinion No. 1975-46.

Senator Durenberger made no attempt to conceal his publishing arrangement. Rather, he spoke freely with his

6/

As we have repeatedly stressed, Senator Durenberger performed a continuing service for Piranha whether or not his appearances are considered book promotion appearances.

colleagues about it. He also disclosed the income he received from Piranha on his financial disclosure statements.

Senator Durenberger's conduct clearly indicates he believed that the contract and its implementation were above board and did not circumvent the honorarium limitations in an unlawful manner.

II. THE CONDOMINIUM TRANSACTIONS WERE NOT SHAMS DESIGNED UNLAWFULLY TO OBTAIN SENATE REIMBURSEMENTS

Contrary to Special Counsel's conclusions, Senator Durenberger's condominium transactions were legitimate real estate transactions where ownership interests changed hands. They were not shams.^{1/} Sworn testimony shows that each transaction consisted of an original agreement between the parties, reliance on attorneys to structure and complete the transaction, and reliance by the parties on the agreement.

The evidence demonstrates that Senator Durenberger, by seeking legal advice from around a half dozen lawyers, at all times attempted to comply with

^{1/} Certainly the evidence does not clearly and convincingly show that these transactions were not legitimate.

relevant laws and regulations. Had counsel advised that either of the proposed transactions was unlawful, the Senator would not have pursued it.

While documents were drafted and executed some time after the agreements were reached, this does not demonstrate that the transactions were invalid under Minnesota law or that Senator Durenberger acted in bad faith to obtain reimbursements. To the contrary, under Minnesota law a real estate transaction can be made effective prior to the date the documents are executed, if the parties so intend. See, e.g., Travelers Ins. Co. v. Horseshoe Lake Farms, Inc., CX-89-1748 (Minn. Ct. App., May 29, 1990) (Attachment 1). Moreover, Special Counsel has not concluded that Senator Durenberger acted with specific intent to violate the Senate reimbursement rules.

A. Partnership Transaction

The evidence shows that, in July 1983, Senator Durenberger and Roger Scherer agreed to combine their condominiums into a joint business venture, from which the Senator would rent condominium no. 603. They left the details of the arrangement and preparation of the necessary documentation to the attorneys. The partnership documents,

which were prepared in late 1983 and early 1984, specifically stated that they recorded and further defined the oral agreement reached between the parties in July 1983.

Special Counsel cites no authorities to show that this transfer was invalid under Minnesota law.^{8/} While it now appears that the notarizations on the quit claim deeds were backdated, Senator Durenberger was not present when the notarizations were afixed and had no knowledge of this until late last year.

Senator Durenberger did not request Senate reimbursement for rents paid to the partnership until January 1984 and only after receiving written opinions from his attorney, Randy Johnson, that this was allowed by Senate rules. Lori Krage, his former bookkeeper, states under oath that she received similar advice from the staffs of the Senate Rules and Ethics Committees; her March 13, 1984 memorandum so indicates. Special Counsel cites no Senate rule or ruling to show that this conclusion is erroneous.

^{8/} Moreover, Deloitte & Touche has given its opinion that a partnership existed for tax purposes as of July 28, 1983. See Durenberger Ex. 14, Attachment 1.

B. Sale To ISC

The agreement to sell the condominium to ISC was made between Mike Mahoney, the Trustee of Senator Durenberger's blind trust, and Paul Overgaard, the owner of Independent Service Company. The sworn statements of Paul Overgaard, Doug Kelley, then the Senator's Administrative Assistant, and Mike Mahoney indicate that this agreement was reached some time in late 1986 or early 1987. Mr. Mahoney later prepared the sale documents, drafting the agreement of sale to relate back to an earlier date (April 1, 1987), a result allowed by Minnesota law, if the parties so intend. The Senator did not submit reimbursement vouchers for rents paid to ISC until the effective sale date had been established to Mr. Kelley's satisfaction.

Despite delays in the completion of the documentation, both Senator Durenberger and Mr. Overgaard believed a final agreement had been reached and acted accordingly. Mr. Overgaard made a downpayment and paid expenses and taxes relating to the condominium; the Senator paid rent to ISC. Although Mr. Overgaard offered to return the condominium to the Senator after he became frustrated with Mr. Mahoney's delays in completing the transaction -- a frustration the Senator shared -- Mr. Overgaard never had

any legal obligation to do so.

Special Counsel suggests that, during the periods at issue, the number of Senator Durenberger's stays in the condominium were related to the need to cover the condominium's operating expenses. This would be improper, however, only if the stays were not for official business reasons. The sworn evidence is that the Senator's staff was assiduous in assuring that reimbursements were sought only for official business stays. Moreover, the Senator has spent approximately 100 nights per year in Minneapolis on official business during all the years he has been in the Senate. In the last several years, his colleague, Senator Boschwitz, has been in Minneapolis even more frequently on official business. This is the way Minnesota's Senators represent the people of their State.

III. THE SANCTION SPECIAL COUNSEL RECOMMENDS IS MUCH TOO HARSH AND IS NOT WARRANTED BY THE FACTS OR PRECEDENT

Special Counsel recommends that Senator Durenberger be denounced for his conduct, even though Special Counsel has explicitly declined to conclude that the Senator acted with specific intent to violate any law. We submit that denouncement is much too severe a sanction in these circumstances. This is especially so because Special

Counsel acknowledges that Senator Durenberger is otherwise a "great Senator," an assertion the facts bear out. While some sanction may be warranted, nothing more than a strong reprimand is appropriate. The sanction should fit the nature of the conduct actually involved.

The only Senator who has been denounced is Herman Talmadge. In that case, there was criminal conduct -- theft of Senate and campaign funds -- by the Senator's administrative assistant, who went to jail for his actions. The sanction of denouncement was imposed essentially because it was concluded that Senator Talmadge should have known of the criminal conduct in his office. The Talmadge case, because of the existence of crimes, involved circumstances far more serious than those present here where there is no criminal conduct. Moreover, there was -- in stark contrast to the present situation -- no evidence in the Talmadge case that he sought and relied on advice from numerous lawyers, the staffs of the Senate Rules and Ethics Committees, and the FEC.

We also strongly object to Special Counsel's use of the word "reprehensible" to describe Senator Durenberger's conduct. This word connotes moral turpitude, malicious conduct and venality. Such conduct, as Special

Counsel essentially has admitted, is not present here. Special Counsel has expressly stated that he has not found that Senator Durenberger acted with "malice," criminal intent, or even specific intent to violate a law.^{9/} It would be grossly unfair permanently to damage Senator Durenberger's reputation with this characterization when the evidence does not support a finding of bad faith or intentional impropriety.

Similarly, the Committee should not conclude that Senator Durenberger's conduct has brought dishonor and disrepute to the Senate. In this century these words have been applied to Senators Joseph McCarthy, Thomas Dodd, Harrison Williams, Hiram Bingham and Herman Talmadge, but each of these matters involved facts clearly distinguishable from the present case.

^{9/}

Had Senator Durenberger's conduct been intentionally improper, it might be expected that he would not have kept the many personal items in his files that were produced to the Committee and upon which Special Counsel now relies.

Senator McCarthy was censured (condemned^{10/}) for intentionally obstructing Senate committee investigations and for repeatedly abusing and defaming Members of the Senate in a most offensive manner. Senator Dodd was censured because he had intentionally misled constituents by stating that money collected at fund raisers and political testimonial dinners would be used to pay off his campaign expenses and debts. In fact, much of the money (\$116,000) was diverted for Senator Dodd's personal purposes. This Committee voted to expel Senator Williams for bribery and other crimes after he was convicted of these offenses. Senator Bingham was condemned for placing a paid official of a trade association interested in pending legislation on the Senate payroll and allowing him to attend secret sessions of the Senate Finance Committee about that legislation. Senator Talmadge's circumstance -- which involved criminal conduct the Committee found he should have known about -- has already been discussed. None of those situations is

^{10/}

The record of the debate in the McCarthy matter showed that the terms "censure" and "condemn" were considered to be synonymous.

comparable to that of Senator Durenberger, who took numerous precautions to stay within the rules.^{11/}

The wording of the Committee's report obviously will have a profound impact on Senator Durenberger's life and career. Special Counsel's suggestion that the Committee essentially adopt his report should not be accepted because his views and language are excessively severe. We thus urge the Committee carefully, fairly, and independently to choose the language it uses in its report to the Senate.

STATEMENT OF BASIC POINTS
AND SUPPORTING EVIDENCE

For the Committee's convenience, we state below, in "bullet point" form, the basic factual conclusions the record demands. We then support these "bullet points" by quotations and citations from the record.

^{11/} S. Res. 338 speaks of conduct that may "reflect upon the Senate." See Sec. 2(a)(1); see also Rule 2(a) of the Committee's Rules of Procedure. We respectfully suggest that the Committee should not go beyond this language in these circumstances.

I. GENERAL FACTS AS TO THE SENATOR'S
GOOD FAITH AND RELIANCE ON LEGAL
AND OFFICIAL ADVICE

- Special Counsel has not concluded that Senator Durenberger acted with criminal intent, malice or with a specific intent to break the law. Rather, he concludes only that Senator Durenberger knowingly and willfully engaged in conduct that Special Counsel now finds has violated statutes, rules and ethical standards.

See Statement of Special Counsel, found in unofficial transcript compiled by Federal Information Systems Corp., for June 12, 1990 (at p. 47) and June 13 (at p. 27).

[T]here is insufficient evidence supporting a finding that Senator Durenberger acted with criminal intent, or that he acted with malice, or that he acted with specific intent to break the law. . . .

* * *

Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, rules, and Senate standards, and acceptable norms of ethical conduct. . . .

* * *

Senator Durenberger is not charged with fraud. I have not charged the Senator or his friends with a sweeping conspiracy. I have not said that Mr. Horner, Mr. Kelley, Mr. Johnson, Mr. Overgaard or Mr. Diamond have done anything wrong at all. . . . (Emphasis added.)

- At every stage regarding the Piranha Press and condominium matters, Senator Durenberger sought and acted on the advice of counsel.

See Durenberger Exhibits: 6, ¶¶2-4, 8: Affidavit of Donna Hanbery; 9, ¶16: Affidavit of Randall Johnson; 12, ¶3: Affidavit of Richard Langlais; 13, ¶2: Affidavit of Don Lattimore; 14, ¶¶2, 18: Affidavit of Michael Mahoney; 20, ¶2: Affidavit of Jeff Robbins; 21, ¶5: Affidavit of Roger Scherer; and 98: Personal Interview/Deposition of Donna Hanbery, p. 37, lines 3-6, p. 81, line 24 - p. 82, line 4.

- The evidence clearly and convincingly demonstrates that Senator Durenberger at all times acted in good faith and that he had no intent unlawfully to circumvent either the honorarium limitations or the Senate reimbursement rules.

(1) Durenberger Ex. 112, ¶10: Sworn testimony of the Honorable Paul Magnuson.

My conversations with Senator Durenberger have led me to believe that he intended to comply with all laws and Senate rules. He never indicated to me any intention to do anything improper. On the contrary, in regard to his arrangement with his publisher, he assured me that he was proceeding in accordance with an FEC opinion and in accordance with his lawyers' advice. He believed the arrangement met all legal and ethical requirements.

(2) Durenberger Ex. 2, ¶¶11-12: Affidavit of Douglas Coe.

The basis of much of my interaction with Dave is my concern for the overall integrity of his life. As problems with his business arrangements appeared in the press, I would probe in my discussions with him, asking him if he was sure he was doing the right thing. . . . I know of nothing to indicate that he ever intended to do anything improper. . . . I am convinced Dave did not think that anything was wrong with his book deal and

seemed to be totally surprised when questions were raised.

I sincerely feel Dave is not a person to try to take advantage of people or to do things he knows are improper. I spend my life talking to public men, and I am convinced that Dave is not intentionally deceitful nor dishonest. However, Dave has not always made the best decisions. He has been naive and allowed himself to be put into bad situations when his personal problems caught up with him at home. But to me, to make a leap to thinking Dave has intentionally committed illegal or improper acts is unjust and simply wrong.

(3) See also Durenberger Exhibits: 7, ¶7: Affidavit of Eugene Holderness; 6, ¶8: Affidavit of Donna Hanbery; 8, ¶¶9, 16: Affidavit of Thomas Horner; 9, ¶10: Affidavit of Randall Johnson; 12, ¶8: Affidavit of Richard Langlais; 13, ¶6: Affidavit of Don Lattimore; 14, ¶¶18, 27: Affidavit of Michael Mahoney; 15, ¶12: Affidavit of Paul Overgaard; 20, ¶5: Affidavit of Jeff Robbins; 21, ¶12: Affidavit of Roger Scherer; 23, ¶8: Affidavit of Heidi Shaw; 111, ¶1: Supplemental Affidavit of David Steingart.

- Various pressures and strains in Senator Durenberger's personal life caused him to rely on others to handle the details of his personal business affairs.

(1) Durenberger Ex. 112, ¶9: Sworn testimony of the Honorable Paul Magnuson.

. . . . His workload and his personal financial problems had a profoundly enervating effect on him. Many times he appeared exhausted. While he always seemed to focus well upon his senatorial duties, it was apparent that he paid little or no attention to the details of his personal life. He tended to turn over such matters to his staff, his lawyers, and even his friends, and to rely heavily on their advice and on their handling of such affairs. I believe that this combination of personal and financial problems, coupled with the extraordinary efforts Senator Durenberger put into

his senatorial duties often left him too mentally and physically exhausted to render judgment about his personal financial matters and made him all too susceptible to the poor legal advice I believe he received in this area.

(2) Durenberger Ex. 7, ¶8: Affidavit of Eugene Holderness.

. . . . I do believe that Senator Durenberger often does not focus well on the details of his personal financial life and tends to rely too much on advisors and friends in these regards, an approach that apparently has not worked well. This pattern was especially evident during the 1983-1987 period when he was experiencing significant personal and family difficulties. . . .

(3) Durenberger Ex. 2, ¶¶9-10: Affidavit of Douglas Coe.

It was during this low point [in 1984-1985] that Dave came to rely so heavily on others. He didn't have the time or energy to deal with all the details of his life; he had to conserve his resources to fulfill his Senatorial and family responsibilities. His frame of mind led him to trust others with too many of his business arrangements.

It is my understanding that Dave told his lawyers generally what he wanted to do about personal business and left the details to them. . . . The very fact that he asked his attorney to make the arrangements indicates to me his desire to make everything legal. Nevertheless, I am certain that Dave was not spending time focusing on his condominium or book deals during this period; he was simply trying to keep his life together.

(4) See also Durenberger Ex. 5, ¶2: Affidavit of Jodi Mathison Hackett.

II. PIRANHA PRESS

A. DIAMOND'S INITIAL APPROACH TO SENATOR DURENBERGER

- Contrary to Special Counsel's claim, Piranha Press was not a so-called "vanity press" that Senator Durenberger paid to publish his book, Neither Madmen Nor Messiahs. Rather, it was Gary Diamond's idea to publish Senator Durenberger's white papers on defense issues because Diamond, a publisher of trade magazines, was interested in establishing a publishing company for political and historical books and in promoting the Senator's views with which he agreed.

(1) Durenberger Ex. 3, ¶2: Affidavit of Gary Diamond.

In late 1983 or early 1984, I approached Senator Durenberger about publishing his two white papers on defense issues in book format. I was interested in both establishing a small publishing company for political and historical books and in promoting the Senator's views with which I agreed.

(2) Durenberger Ex. 96: Personal Interview/Deposition of Gary Diamond, p. 18, line 23 - p. 19, line 1.

[I]f I could do a good job with Senator Durenberger's books, I might be able to get other senators, congressmen, political people, and military people in Washington to [let me] handle books for them.

(3) Durenberger Ex. 96: Personal Interview/Deposition of Gary Diamond, p. 164, lines 18-19.

The most important thing to me was to establish a publishing company. . . .

(4) See also, Durenberger Ex. 96: Personal Interview/Deposition of Gary Diamond, p. 12, lines 6-9; p. 18, lines 17 - 21.

- Piranha Press was not "selected" to publish the Senator's books in order to "sanitize honorarium payments into something else," as Special Counsel claims. Rather, Neither Madmen Nor Messiahs was released before the Author-Publisher Agreement was reached.

(1) Durenberger Ex. 3, ¶4: Affidavit of Gary Diamond.

Subsequent to the release of Neither Madmen Nor Messiahs, Michael Mahoney, the Senator's attorney, asked me if I would be willing to pay Senator Durenberger a fee for making appearances to promote the book.

(2) See also, Durenberger Ex. 98: Personal Interview/Deposition of Donna Hanbery, p. 7, lines 20 - 24.

B. LEGAL ADVICE SOUGHT

- Senator Durenberger sought legal advice prior to entering the Piranha Press Agreement and relied upon counsel to structure an agreement that was consistent with relevant legal and regulatory requirements.

(1) Durenberger Ex. 8, ¶16: Affidavit of Thomas Horner.

[Senator Durenberger] did not enter the Agreement for the purpose of unlawfully circumventing the honorarium limitations. Rather, he sought and relied upon the advice of his counsel as to the legality of the arrangement, and the acceptance of payments pursuant to the arrangement, prior to its implementation. He also relied upon his counsel to negotiate and draft the Agreement with his Publisher, obtain the necessary

opinion from the FEC, and ensure that the Agreement was properly implemented.

(2) Durenberger Ex. 98: Personal Interview/Deposition of Donna Hanbery, p. 37, lines 3-6.

[O]ur instructions from day one were, "Hey, folks, you've got to sign off on this. We want this to be right. We're not even going to do it unless you tell us it's okay."

(3) Durenberger Ex. 98: Personal Interview/Deposition of Donna Hanbery, p. 81, line 24 - p. 82, line 4.

I know from day one, it was 150 percent clear that our instructions from the Senator were "Make sure that this is okay. I'd like to do this, but I'm asking you guys to keep my skirts clean. Make sure that whatever we do is kosher, it's okay. You give me an opinion on it. You tell me it's all right."

(4) Durenberger Ex. 14, ¶27: Affidavit of Michael Mahoney.

The advice we provided to Senator Durenberger on Piranha Press matters was given in good faith and was based on our legal analysis of the FEC laws and advisory opinions relating to honorarium and stipendiary income. I believe Senator Durenberger did not perform any services under the Piranha Press contract until we advised him that it was legal as set forth in our written opinion regarding the arrangement and we obtained the FEC opinion. I believed, and I so informed Senator Durenberger, that the payments he received from Piranha Press under the contract were not honoraria and were not subject to honoraria limitations, as set forth in my legal opinion and the FEC opinion.

(5) See also, Durenberger Ex. 103: Personal Interview/Deposition of Michael Mahoney, p. 144, lines 14 - 24; Durenberger Ex. 98: Personal Interview/Deposition of Donna Hanbery, p. 7, line

25 - p. 8, line 19; p. 24, lines 17 - 24; p. 71, lines 4 - 8.

- On October 1, 1984, Michael Mahoney twice advised Senator Durenberger in writing that payments to him by Piranha Press under the Author-Publisher Agreement would be payments for continuing services and thus would constitute a stipend not subject to the honorarium limitations.

(1) Durenberger Ex. 14, ¶22: Affidavit of Michael Mahoney.

My firm provided Senator Durenberger with two opinion letters dated October 1, 1984 that stated the conclusion that the fixed payments he would receive from Piranha Press for making promotional appearances under the contract would constitute a stipend as defined by the FEC and would not be subject to the honorarium limitations.

(2) Durenberger Ex. 31: Letter from Michael C. Mahoney to Senator Dave Durenberger, dated October 1, 1984.

(3) Durenberger Ex. 30: Letter from Curtin, Mahoney & Cairns to Senator Dave Durenberger, dated October 1, 1984.

C. REQUEST FOR FEC ADVISORY OPINION

- On October 19, 1984, Mr. Mahoney and Ms. Hanbery requested an advisory opinion from the Federal Elections Commission as to whether the income Senator Durenberger would receive from Piranha Press would qualify as a stipend. They included in the request all information they considered material.

(1) Durenberger Ex. 32: Request for Federal Election Commission advisory opinion by Michael C. Mahoney and Donna E. Hanbery, dated October 19, 1984.

(2) Durenberger Ex. 14, ¶23: Affidavit of Michael Mahoney.

On October 19, 1984, Ms. Hanbery and I requested an advisory opinion from the FEC. We included in the letter to the FEC all of the information regarding the proposed contract that we considered material. In our letter, we requested the FEC to advise us if they wanted any further information regarding the proposed arrangement.

(3) Durenberger Ex. 103: Personal Interview/Deposition of Michael Mahoney, p. 40, line 20 - p. 41, line 13.

Q. And did you not consider it important, in asking the Federal Election Commission to tell you that, to give them all of the information that you had about the proposed arrangement?

A. Not all of the information we had, but all of the information that we considered material. And since in the -- I believe in the information we looked at, -- . . . we didn't see that the source of the payment to the publisher or the radio station or the television station ever entered into the question.

It wasn't -- it was never suggested in anything I ever saw that -- whether this was a pay television station or a promotional or commercial or whether the income was derived from advertising or any other source, the question was: How was the money paid?

So, when you ask the question: Did we give them every fact?; as I looked at it, it was only the material facts that were necessary to make a decision.

(4) Durenberger Ex. 103: Personal Interview/Deposition of Michael Mahoney, p. 129, lines 9 - 23.

Q. If you had known on September 26th of 1984 that requests for honorarium appearances coming to the Senator's office would be transferred to the publisher and that book promotion appearances would be arranged consequently, is that something that you would have told the FEC, you would have felt material fact that you would have wanted to disclose to the Federal Election Commission? In other words, if --

A. I don't think so, as I now -- my recollection of our analysis was that it is the form, substance of the revenue. And the source of referral was never discussed or suggested in any of the materials that we saw as a relevant basis for making that determination. So my recollection of my -- of our research and analysis would be that no, it would not be material.

(5) See also, Durenberger Ex. 103: Personal Interview/Deposition of Michael Mahoney, p. 43, lines 4 - 21; p. 48, line 16 - p. 49, line 3.

- Special Counsel contends that the Senator's contract with Piranha Press did not "constitute a good-faith book promotion agreement" because "it varied significantly from a traditional standard book publishing agreement."^{12/} However, the request for advisory opinion submitted to the FEC expressly disclosed that Piranha Press had agreed to pay Senator Durenberger for promotional appearances over a two-year period of time. The FEC did not conclude that the Piranha Press agreement "did not constitute a good-faith book promotion agreement."

^{12/} Special Counsel quoted from the affidavit of Samuel Vaughn, senior vice president and editor at Random House, Inc.: "Any agreement whereby a publisher agrees to pay an author for promotional appearances over a two-year period of time would be extraordinary." S.C. Ex. 81.

(1) Durenberger Ex. 37: Advisory Opinion of the Federal Election Commission addressed to Michael Mahoney and Donna Hanbery, dated December 6, 1984.

According to your request, under the author-publisher agreement, Senator Durenberger has conveyed to the Publisher certain rights in the book and has also agreed to make a specified number of promotional appearances over a two-year period to promote both the book and the Publisher. As compensation for the rights in the book transferred by Senator Durenberger and for the personal services to be rendered by him to promote the book and the Publisher, the Senator will be paid an agreed-to sum in quarterly installments over a two-year period. . . .

(2) Durenberger Ex. 6, ¶6: Affidavit of Donna Hanbery.

In the request for the advisory opinion, I stated that Piranha Press would pay Senator Durenberger an agreed to sum in quarterly installments over a two year period as compensation for the Senator making appearances to promote the book and the publisher. I invited the FEC to contact me if it needed additional information. Because this appeared to be a somewhat unique arrangement, I assumed that if the FEC thought additional information was necessary to evaluate the request, it would come back with specific questions. The FEC responded with a letter dated October 25, 1984 stating that it would contact me if additional information was needed. However, the FEC never asked for additional information.

(3) See also, Durenberger Ex. 113, p. 2:
Affidavit of Marshall Houts. 13/

Publisher-author contracts can take any form the parties work out to their mutual satisfaction.

In short, simply because a publishing contract does not fit the usual royalty contract mode does not in any way make it an unreasonable or improper agreement.

D. THE FEC'S RULING

- The FEC reads the term "honorarium" narrowly and distinguishes between honoraria which are subject to limitation and stipends which are not.

See FEC Advisory Opinion 1975-46, Federal Election Campaign Financing Guide (CCH) ¶5153.

[M]oney received by an officer or employee of the Federal government is considered an "honorarium," regardless of whether it is offered gratuitously or as a fee, if it is accepted as consideration for an appearance, speech, or article. In addition, such money must be accepted as a payment for a single event or transaction and under circumstances which do not imply a continuing compensatory relationship between the parties for similar services. On the other hand, an officer or employee of the Federal government is considered to accept a "stipend". . . if the money is accepted in the form of fixed or regular compensation intended as consideration for the rendering of services, e.g., a salary.

13/ We respectfully request that this affidavit, which was not submitted to the Committee during the hearing, now be made part of the record as Durenberger Exhibit 113 (Attachment 2).

- The Ethics Committee has deferred to the FEC's definition of stipend.

See Interpretative Ruling No. 424 (Feb. 5, 1988).

Payments received for providing commentaries on a continuing basis which the FEC would consider a 'stipend' under 2 U.S.C. 441i constitute 'stipends' rather than honoraria for the purpose of 2 U.S.C. 31-1 as well. Therefore, those payments do not need to be counted against the 40% limitation on honoraria.

- The FEC's advisory opinion concluded that the Senator's arrangement with Piranha Press created "a stipendiary relationship" and that "payments made to Senator Durenberger under this agreement would not be viewed as honoraria and therefore would not be subject to limitation . . ."

(1) Durenberger Ex 37: Advisory Opinion of the Federal Election Commission addressed to Michael Mahoney and Donna Hanbery, dated December 6, 1984.

(2) Durenberger Ex. 14, ¶23: Affidavit of Michael Mahoney.

On December 6, 1984, the FEC issued an opinion concluding that the arrangement whereby Piranha Press would pay Senator Durenberger in quarterly installments over a two year period created a stipendiary relationship. Accordingly, the FEC opined that payments made to Senator Durenberger under this arrangement would not be viewed as honoraria and would not be subject to honorarium limitations. We forwarded the FEC opinion to Mr. Horner and told him that Senator Durenberger could begin making appearances under the contract.

(3) See also, Durenberger Ex. 8, ¶13: Affidavit of Thomas Horner.

- Despite the massive publicity surrounding the Piranha Press arrangement, the FEC has never withdrawn its advisory opinion or begun an investigation of this matter.

See D. Smith, "Speech Fees Routed Through Publisher," St. Paul Pioneer Dispatch (May 21, 1986).

Told of the nature of the promotions, FEC assistant press officer Sharon Snyder said, "I don't think that legally changes the fact that he is getting a stipend (a fixed amount) and not an honoraria . . . He is performing services for the company and has a contract with the publisher."

E. THE SENATOR'S CONTINUING SERVICES

- The Senator clearly was performing a continuing service for Piranha Press -- i.e. making appearances for which it was paid and helping to establish it as a book publishing company. The Senator was not separately paid for individual appearances.

(1) Durenberger Ex. 96: Personal Interview/Deposition of Gary Diamond, p. 164, lines 4 - 9.

So the more -- the wider range we went, the more people that knew about us, the better. Then I might be able to sign up, you know, other congressmen, other people in government, and such; in other words, make a success of this and it could become a -- it could have become a fairly decent publishing firm, --

(2) Durenberger Ex. 97: Personal Interview/Deposition of Gary Diamond, p. 39, lines 2 - 4.

All the money that we raised came to me. The only money he [Senator Durenberger] got, in any form whatsoever, was the \$12,500 quarterly.

(3) Durenberger Ex. 3, ¶¶4, 7: Affidavit of Gary Diamond.

In return for doing the appearances, the Senator would be paid \$12,500 quarterly.

Pursuant to the terms of the agreement, Piranha Press paid Senator Durenberger a total of \$100,000 for appearances made in 1985 and 1986.

F. GOOD FAITH TRANSFER OF REQUESTS FOR APPEARANCES

Requests for honorarium appearances were referred by the Senator's office to Piranha Press in the good faith belief that such referrals were not improper.

(1) Durenberger Ex. 8, ¶¶14 - 15: Affidavit of Thomas Horner.

When I became aware that requests for speaking engagements that had been accepted by the Senator would be referred to Piranha Press for handling under the contract and that the organization involved would pay fees to Piranha Press, I asked Mr. Mahoney whether the request for the FEC advisory opinion fairly reflected these circumstances. Mr. Mahoney assured me that the request for the advisory opinion was based upon a fair representation of the arrangement. I related this information to Senator Durenberger.

By letter dated February 15, 1985 . . . I sent Mr. Mahoney a number of honorarium invitations that had been accepted on behalf of Senator Durenberger prior to the Agreement between the Senator and Piranha Press. In the letter, I expressed my understanding that, in accordance with the publishing Agreement, Mr. Mahoney's law firm, acting as an agent of Piranha Press, would negotiate and collect the fee for these appearances. Mr. Mahoney never advised me that

this conduct was inconsistent with the FEC advisory opinion or otherwise improper.

(2) Durenberger Ex. 14, ¶124, 27: Affidavit of Michael Mahoney.

Requests made to the Senator's office for appearances were referred to me for handling as Piranha appearances. We generally contacted the requesting organizations and explained that the Senator's appearance would be in the nature of a book promotion. I believed that the referral of requests for appearances to Piranha Press was proper and consistent with the FEC advisory opinion. The implementation of the Piranha contract did not cause me to question the value of the FEC opinion.

The advice we provided to Senator Durenberger on Piranha Press matters was given in good faith and was based on our legal analysis of the FEC laws and advisory opinions relating to honorarium and stipendiary income. . . . I was actively involved in coordinating the Senator's Piranha Press appearances. I believed, and I so informed Senator Durenberger, that the payments he received from Piranha Press under the contract were not honoraria and were not subject to honoraria limitations, as set forth in my legal opinion and the FEC opinion.

(3) Durenberger Ex. 17, ¶6: Affidavit of Anne Kelly Planning.

During this time, I did not have occasion to learn or otherwise come to believe that the Senator's receipt [of income relating to his book] was an illegal circumvention of the honorarium limits or was otherwise impermissible. Accordingly, I had no reason to believe that it was inappropriate to refer requests for appearances by the Senator to his attorney Michael Mahoney or to Piranha Press, the publisher of the Senator's book. Nor, to the best of my knowledge, during my tenure, was I advised by Mr. Mahoney or

anyone else that such referral was inappropriate or otherwise improper.

(4) Durenberger Ex 11, ¶¶3, 6: Affidavit of Douglas Kelley.

The Senator's attorney, Michael Mahoney, explained to me that they had obtained an advisory opinion from the Federal Election Commission that the income the Senator received from Piranha was a stipend and not honoraria and thus was not subject to the statutory limitations on honoraria.

* * *

At the time I joined Senator Durenberger's staff and through the end of the Piranha Press contract period, some requests for speech appearances that came into the Senator's office were referred to Piranha Press. These particular requests were forwarded to Mr. Mahoney. . . . I believed from the outset that this conduct was appropriate and within the coverage of the FEC opinion. At no time did I question the validity of the FEC opinion.

(5) Durenberger Ex. 5, ¶¶5, 6: Affidavit of Jodi Mathison Hackett.

Speech requests that were made to our office were often referred to Piranha Press. When a speech had been designated a book promotion speech, I would call the contact person and tell him that the Senator was interested in speaking to the group. I would also explain that the Senator had an agreement with his publisher for the promotion of his book, what the publisher's fee would be, that payment of the fee would be made to the publisher, rather than to the Senator, and that Mr. Mahoney would be in contact with him. I would then forward the information regarding the speech request to Mr. Mahoney. It was my

understanding that Mr. Mahoney would contact the organization.

* * *

I was never advised by Mr. Mahoney or anyone else that the manner in which I handled Piranha Press appearances was inappropriate or improper.

- Special Counsel has not cited any authority demonstrating that such referrals somehow violated any law or Senate Rule.

G. EFFORTS TO PROMOTE BOOKS

- Special Counsel asserts that "most of the time [Senator Durenberger] never mentioned the books at all, nor did he ever mention the publisher." This characterization is not supported by Special Counsel's own evidence, which demonstrates that Senator Durenberger mentioned his books and/or his publisher more often than not.

(1) Special Counsel submitted 38 affidavits from individuals who actually attended Senator Durenberger's Piranha Press appearances. Of those affiants, 18 stated that Senator Durenberger did mention his books and/or his publisher during his remarks. S.C. Exs. 12; 16 - 17; 24; 29; 45; 47; 57; 62 - 63; 70; 76; 79 - 80; 82 - 84; 89.

(2) Nine affiants stated that Senator Durenberger did not mention his books or his publisher. S.C. Exs. 10 - 11; 13; 15; 18; 23; 28; 33; 44. One such affiant, Bob Bergland, Executive Vice President and General Manager of the National Rural Electric Cooperative Association ("NRECA"), stated categorically that Senator Durenberger did not discuss his books or publisher during his speech. S.C. Ex. 11, ¶6. However, the transcript of Senator Durenberger's remarks before NRECA demonstrates otherwise. S.C. Ex. 230, p. 13.

(3) The remaining 11 affiants stated only that they did not recall whether the Senator mentioned

his books or his publisher during his remarks, including Beatrice Bleicher, former Washington Counsel and Director of Government Relations for Owens-Illinois; Olga Grkavac, Vice President of Government Relations for the Association of Data Processors; and Ted Heydinger, Vice President of Government Relations for CBEMA. S.C. Exs. 12; 14; 21-22; 27; 30; 32; 34 - 35; 37; 39 - 40. However, the transcripts of Senator Durenberger's remarks before Owens-Illinois, the Association of Data Processors and CBEMA demonstrate that he did in fact discuss one of his books at those appearances. S.C. Ex. 232, pp. 1, 27-28; S.C. Ex. 204, pp. 26, 32; S.C. Ex. 216, pp. 2-4.

(4) Special Counsel also submitted transcripts of tape recordings of Senator Durenberger's remarks before 34^{14/} organizations. Senator Durenberger mentioned his books and/or his publisher in his remarks before 24 of those organizations. S.C. Exs. 203 - 205; 207 - 210; 213 - 218; 222; 225 - 227; 230 - 232; 234 - 235; 237; 243.

- The members of the Senator's staff who attended his speeches stated in their affidavits that copies of the books were available at Piranha Press appearances and that the Senator mentioned his book at many of those appearances.

(1) Durenberger Ex. 19, ¶3: Affidavit of Jim Roane.

One of my responsibilities was to ensure that the Senator always had copies of his books at Piranha Press appearances. At many of the Piranha Press appearances I attended, Senator Durenberger talked about his books and his publisher.

14/ Special Counsel Exhibit 221 is mislabeled; it is not the transcript of Senator Durenberger's remarks before General Electric, but rather is a transcript of a weekly radio news conference.

(2) Durenberger Ex. 10, ¶9: Affidavit of Charles Kahn.

I sometimes accompanied the Senator to his health care speeches. I recall that the Senator's driver, Jim Roan, had copies of the Senator's books in the car used to drive to the Senator's appearance. I do remember the Senator's books were sometimes displayed at these appearances. Until the health book was completed, I remember at certain appearances the Senator saying he had written a book on defense policy which his publisher was offering for sale and was in the process of writing a book on health policy. I also specifically recall the Senator holding up a book at certain appearances I attended. I do not recall his remarks from most of the appearances I attended. Generally he mentioned the books and then went on to talk about broader subjects. I remember the Senator discussing the availability of the books for sale

(3) Durenberger Ex. 26, ¶4: Affidavit of R. Duffy Wall.

When the Senator arrived at our offices for his speaking appearance, he discovered his aide did not have a copy of the book with him. He sent his aide back to his office to retrieve copies of the book.

- Senator Durenberger believed that by speaking well he promoted himself and his ideas and thus his books and his publisher. Authors need not discuss their books in detail in order to promote them effectively.

(1) Durenberger Ex. 113, p. 3: Affidavit of Marshall Houts.

It is not necessary for [authors] to wave their books in front of audiences and discuss them in detail. As a matter of fact, this could well turn off the audience. In their public appearances, authors promote themselves by getting their names before the public. Effective

promotion of a specific book is, in effect, incidental, and requires this subtle approach.

(2) Durenberger Ex. 113, p. 2: Affidavit of Marshall Houts.

I worked closely with Erle Stanley Gardner for 19 years, both as General Counsel to his Court of Last Resort and on the Perry Mason TV show. I accompanied him on a minimum of 50 "book promotion" speeches he made to live audiences all over the country. In all of these speeches, I never once heard him mention a single one of his books.

I can reproduce his philosophy on book promotion verbatim:

"It's arrogant enough for any person to think he can write a book others will pay good money to read. It would be a double insult to hear some author get up in front of an audience and plug his own book, telling people to rush out and buy it.

"I'll take my chances with the buying public by just showing up and talking about something of general interest, not about Gardner books, or how I write them. When they go to a book store later and see one of my books, they'll say, 'By golly, I heard that guy talk, and I liked him; so I'll sample his book. I don't really give a damn what the subject is, since I liked what the guy looked like and the way he talked!'"

(3) Special Counsel Ex. 129, p. R: September 12, 1986 letter from J. B. Cordaro, President, Council For Responsible Nutrition, to Gary Diamond, Publisher, Piranha Press.

Senator Durenberger was a smashing success and his remarks were right to the point. Would that all of our outside speakers could relate

their particular areas of expertise and interest to our mutual concerns.

I would appreciate it if you would send me information on the per copy price and a bulk rate for Senator Durenberger's book.

- Special Counsel incorrectly asserted that "those few [sponsors] who agreed to have books couldn't get them." Special Counsel cited only the affidavit of Marcie McNelis, who was unsuccessful in obtaining books from the publisher for the State Governmental Affairs Council. S.C. Ex. 58. He did not cite the affidavits of those sponsors who stated that copies of the Senator's books were made available to their members or registrants. S.C. Exs. 47, ¶13: Affidavit of Robert Krawle; 34, ¶18, 14: Affidavit of Barry Gottehrer; 70, ¶21: Affidavit of Michael Romansky; 24, ¶6: Affidavit of Cynthia Darnell.
- The obligation to provide promotional materials to sponsors was Piranha's. Its failure to do so is typical of publishers.

(1) Durenberger Ex. 14, ¶¶25, 26: Affidavit of Michael Mahoney.

My firm also prepared letters to the organizations for Gary Diamond's signature that confirmed the terms and conditions of the appearances. The letters stated that the organizations should make space available at the event for the prominent display and sale of the Senator's books and that Piranha Press would provide promotional materials.

I assumed it was Piranha Press' responsibility to provide copies of the books and promotional materials to the organizations.

(2) See e.g., S.C. Ex. 90, pp. E-F: Documents Related to Senator Durenberger's Appearance Before A.B. Laffer Associates, September 16, 1986; Letter from Gary Diamond to Ms. Wendy Costantino, dated September 4, 1986.

Because Senator Durenberger's appearance before your organization will be in promotion of his book(s), we expect that you will make available to us adequate space at or near the entrance to the function at which Senator Durenberger will be speaking for the prominent display and sale of his book(s). We will provide all necessary promotional literature.

(3) Durenberger Ex. 3, ¶6: Affidavit of Gary Diamond.

On a few occasions, I forwarded copies of the Senator's books to organizations that agreed to display them at the Senator's appearances. However, in the majority of cases, I did not provide copies of the books or other promotional materials to the organizations.

(4) Durenberger Ex. 113, pp. 4-5: Affidavit of Marshall Houts.

In many, many instances, publishers do not take advantage of sales promotion activities presented them by an author in the form of speaking engagements. They do not make books physically available, nor do they even have on-site brochures or order blanks.

This is particularly true of small publishers who do not have either the financial means or the know-how to market books. Many of them fail because of these two deficiencies.

A publisher's amateurish performance cannot be held against the author who does all he can to offer the publisher book promotional opportunities.

- Special Counsel, apparently in an attempt to show that the Piranha Press agreement was not a good faith effort, incorrectly asserted that "there was no marketing plan" for the Senator's books.

(1) Durenberger Ex. 3, ¶¶2, 3: Affidavit of Gary Diamond.

The white papers were edited and published under the name Neither Madmen Nor Messiahs in the fall of 1984. The book was sold in B. Dalton Booksellers bookstores.

In 1986, Piranha published Prescription For Change, which was a collection of the Senator's speeches on health policy issues. That book was sold through a direct mail marketing campaign targeted at hospitals, insurance companies and others involved in health-related industries.

H. CAMPAIGN CONTRIBUTION ISSUE

- Special Counsel asserts that Senator Durenberger "converted a campaign contribution" to his personal use and failed to report the contribution. Although the Pathology Practice Association Federal Political Action Committee check was deposited by Piranha Press, it was not endorsed by Senator Durenberger or his campaign committee. There is no evidence that Senator Durenberger was even aware of the check. The evidence shows that the PAC did not send the check to the campaign committee, but to Paul Johnson of Fleishman-Hilliard. There is no evidence as to where Mr. Johnson sent the check. The evidence shows that other organizations sent checks payable to Senator Durenberger directly to Piranha Press and that those checks were similarly deposited by Piranha without endorsement.

(1) Durenberger Ex. 54: Documents related to Senator Durenberger's appearance before the Pathology Practice Association, December 5, 1986.

(2) Durenberger Ex. 55: Documents related to Senator Durenberger's appearance before the

National Real Estate Investment Forum, April 19, 1985.

(3) Durenberger Ex. 56: Documents related to Senator Durenberger's appearance before the World Congress on the Cornea, November 19, 1985.

III. CONDOMINIUM ISSUES 15/

A. INITIAL DECISION TO COMBINE CONDOMINIUMS AND RELATED LEGAL ADVICE

- In June, 1983, an attorney for the Senator, Randy Johnson, advised in writing that Senate reimbursement for rents paid for use of the condominium while on official business should be proper if the Senator's legal and voting residence was changed to Avon, Minnesota.

(1) Durenberger Ex. 9, 14: Affidavit of Randall Johnson.

In June 1983, in response to questions from Gene Holderness and Tom Horner, I sent a June 28, 1983 letter to the Senator advising that he could minimize any possible concern about receiving reimbursement out of Senate funds for nights spent at the condominium he was going to rent if:

15/ We again observe that, as to the condominium issue, Special Counsel has submitted sworn testimony, i.e., ex parte depositions, from only two of the major participants -- Mr. Overgaard and Mr. Mahoney. We, however, have submitted sworn affidavits from all of the major participants involved with Senator Durenberger in this matter. These affidavits contain the information that would have been elicited from these witnesses at the hearing during either direct or cross examination.

- (a) he listed and sold his newly acquired condominium unit within a reasonable time and
- (b) he changed his legal and voting residence to somewhere outside the Twin Cities area, such as his parents' home in Avon, Minnesota, which was perfectly acceptable under Minnesota law.

(2) See also Durenberger Ex. 7, ¶6: Affidavit of Eugene Holderness; and Durenberger Ex. 8, ¶5: Affidavit of Thomas Horner.

- -On July 28, 1983, the Senator and Roger Scherer agreed to combine their two condominiums into a joint business venture, the details of which were left to lawyers.

(1) Durenberger Ex. 21, ¶5: Affidavit of Roger Scherer.

Senator Durenberger and I reached an oral agreement to combine our properties into a joint business arrangement on or about July 28, 1983. The lawyers were instructed to work out the details of the transaction, and it was decided that a partnership would be the appropriate vehicle to accomplish our goals.

(2) Durenberger Ex. 12, ¶¶3-4: Affidavit of Richard Langlais.

Senator Durenberger contacted me in the summer of 1983 seeking tax advice regarding a proposed exchange of condominiums with Roger Scherer. I concluded that this arrangement would entail adverse tax consequences and instead recommended the formation of a partnership between the Senator and Mr. Scherer to which their condominiums would be transferred.

Subsequently in July 1983, I was told that the partnership transaction had been chosen and was asked to draft an agreement. (Emphasis added.)

(3) See also Durenberger Ex. 7, ¶5: Affidavit of Eugene Holderness; Durenberger Ex. 8, ¶4: Affidavit of Thomas Horner; and Durenberger Ex. 14, ¶3: Affidavit of Michael Mahoney.

B. PREPARATION OF PARTNERSHIP DOCUMENTS AND RELATED LEGAL ADVICE

- Three Minnesota attorneys -- Richard Langlais, Don Lattimore, and Michael Mahoney -- and David Steingart, a law clerk in Mr. Mahoney's office, were involved in preparing the partnership agreement.

See Durenberger Exhibits: 12, ¶4: Affidavit of Richard Langlais; 13, ¶2: Affidavit of Don Lattimore; 14, ¶4: Affidavit of Michael Mahoney; 21, ¶5: Affidavit of Roger Scherer; 24, ¶¶2-3: Affidavit of David Steingart.

- The written partnership agreement, which expressly stated that it recorded and further defined the earlier oral agreement between the parties, made the effective date of the partnership July 28, 1983, although the partnership documents were prepared and signed some months later. The affidavits show that this was done in good faith to reflect the situation.

(1) Durenberger Ex. 12, ¶7: Affidavit of Richard Langlais.

The partnership agreement drafted by my firm stated that it recorded and expanded upon the agreement reached between Senator Durenberger and Mr. Scherer on July 28, 1983. This document was prepared by us in good faith to reflect the situation as we understood it.

(2) Durenberger Ex. 14, ¶4: Affidavit of Michael Mahoney.

I assigned one of the people working with me, David Steingart, to the project. He drafted a partnership agreement, principally taken from Dick Langlais' version, and a lease. The partnership agreement expressly stated that it recorded and expanded upon the oral agreement reached between the parties in July, 1983, as does the Langlais version.

(3) See also Durenberger Ex. 13, ¶3: Affidavit of Don Lattimore; and Durenberger Ex. 24, ¶3: Affidavit of David Steingart.

- In December 1983, Mr. Johnson advised in writing (1) that Senate reimbursement for official business stays in the condominium would be proper if Senator Durenberger transferred his interest in the condominium to the partnership, and (2) that all partnership documents should be dated prior to August 1, 1983.

Durenberger Ex. 9, ¶6: Affidavit of Randall Johnson.

When I learned in December 1983 that Senator Durenberger's condominium documentation still had not been completed, I wrote him a December 29, 1983 letter urging that it be done. In this letter, I advised that, under the Senate Rules, I believed he could claim reimbursement for official business stays at the condominium that he rented from the partnership. I also said that the paperwork for the transaction should be completed and dated before August 1, reflecting the oral agreement between the Senator and Mr. Scherer.

- The backdating of certain notarizations on the partnership documents by Mr. Johnson was not done in the Senator's presence and occurred without his knowledge.

(1) Durenberger Ex. 9, ¶7: Affidavit of Randall Johnson.

In February 1984, I received paperwork for the partnership that had been signed by Senator Durenberger and Mr. Scherer. I reviewed the agreement and, recognizing their signatures, notarized certain documents, including quit claim deeds, using the effective date of the partnership, July 28, 1983. The Senator was not present when I affixed the notary. I had no conversation with the Senator about the notarization date nor did he in any way request that date.

(2) See also Durenberger Ex. 21, ¶7: Affidavit of Roger Scherer; Durenberger Ex. 14, ¶6: Affidavit of Michael Mahoney; and Durenberger Ex. 24, ¶4: Affidavit of David Steingart.

- Special Counsel has cited no authority to show that the transfer of the condominium to the partnership was invalid.

C. APPROACH TO STAFFS OF RULES AND ETHICS COMMITTEES

- A member of the Senator's staff double-checked the propriety of reimbursements for rents paid to the partnership by consulting the staffs of the Rules Committee and the Ethics Committee.

(1) Durenberger Ex. 4, ¶4: Affidavit of Lori Krage Edstrom.

In response to a request from Tom Horner in March 1984, I contacted the Rules and Ethics Committees to verify the propriety of reimbursement for rents paid to the partnership. I am not certain with whom I spoke, but, having reviewed the lists of committee staffs from that period, I believe I spoke to John Childers and/or Ann Cook at Rules and Wilson Abney at Ethics. In each instance, I identified myself by name and as a member of Senator Durenberger's staff, and asked

if the Senator could be reimbursed for stays in a condominium owned by a partnership of which he is a partner. The responses I received were that he could so long as the condominium was not his principal residence. I recorded my contacts and the essence of the responses I received in a memorandum to Tom Horner dated March 13, 1984.

(2) See also Durenberger Ex. 8, ¶6: Affidavit of Thomas Horner.

- Special Counsel has cited no authority to show that obtaining reimbursement for rents paid to an entity in which the member has an ownership interest violates any law or Senate rule.

D. THE SENATOR'S INSTRUCTIONS AS TO REIMBURSEMENTS AND HIS DISCLOSURES IN THIS REGARD

- Senator Durenberger instructed his staff to prepare reimbursement requests only for those stays in Minnesota associated with official Senate business.^{16/} The number of nights per year Senator Durenberger consistently has spent in Minneapolis on official business (around 100)^{17/} is less than that spent by Senator Boschwitz in each of the last two years.

(1) Durenberger Ex. 4, ¶6: Affidavit of Lori Krage Edstrom.

I submitted vouchers and receipts to the Senate Disbursing Office for per diem reimbursements for the Senator's official business stays in the condominium. In all instances, the Senator's staff attempted to ensure that he received

^{16/} No claim has been made that the daily rates charged for the condominium were excessive.

^{17/} Even during the pre-1983 period when he was the sole owner of the condominium.

reimbursement only when his stays were connected with official Senate business.

(2) Durenberger Ex. 23, ¶3: Affidavit of Heidi Shaw.

During the period that Senator Durenberger was renting from the partnership, I tracked his stays in the condominium, confirmed that information with the Minneapolis office, and forwarded it to Jean Stow, the partnership's bookkeeper. She then sent bills to the Senator. I attached bills for official business stays to Senate vouchers. The Senator subsequently was reimbursed for payments made to Stow concerning official business stays.

(3) Durenberger Ex. 95: Information provided by Senator Boschwitz.

In 1989, I spent 144 nights in Minnesota. On twenty-four evenings, I stayed outside the metro area. . . . The balance were at my house in the Twin Cities. 1989 was a bit heavier than usual as I was in my re-election cycle.

1988 was a more typical year and I spent 122 nights in Minnesota. Nine were outside the metro area. . . . The balance were at my Twin Cities home.

- Rental bills attached to reimbursement vouchers indicated that Senator Durenberger always returned to the same condominium when in Minneapolis. The Senate Disbursing Office never advised him that reimbursement for condominium rents during adjournment periods was impermissible because the condominium was his usual place of residence during those periods.

(1) Durenberger Ex. 5, ¶7: Affidavit of Jodi Mathison Hackett.

I am familiar with the condominium reimbursements that were submitted to the Senate and know that they indicated the Senator was staying in the same condominium each time he returned to the Twin Cities and that they were submitted in this manner for over six years.

(2) See, e.g., Durenberger Exs. 67, 74.

- There was no attempt to deceive the Senate as to Senator Durenberger's interest in the partnership from which he rented the condominium. As noted, the staffs of the Rules and Ethics Committees had been told about this by Lori Krage, the Senator's bookkeeper. The Senator's interest in the partnership was also identified to the Ethics Committee as a blind trust asset.

(1) Durenberger Ex. 4, ¶5: Affidavit of Lori Krage Edstrom.

There was no attempt to deceive the Senate about the ownership of the condominium. My March 21, 1984 memorandum about changing the partnership's name must be read together with my March 13, 1984 memorandum about my contacts with the staff of the Rules and Ethics Committees apprising them of the situation. Moreover, we involved Mr. Steingart from Mr. Mahoney's law offices in the process. I assumed he would have objected had any improper intent or conduct been perceived by him.

(2) Opening Statement of Special Counsel to Senate Ethics Committee, Unofficial transcript compiled by Federal Information Systems Corp., for June 13, 1990 (at p. 32).

I'm not suggesting Ms. Craig [sic] did anything improper.

(3) Durenberger Ex. 8, ¶8: Affidavit of Thomas Horner.

The partnership's name change was not done with any intent to mislead. Misleading would have served no purpose in light of the opinions of Johnson and the staffs of the Rules and Ethics Committees that it was permissible to seek reimbursement for rent for a condominium owned by a partnership in which the Senator had an interest.

(4) Durenberger Ex. 111, ¶2: Supplemental Affidavit of David Steingart.

In effecting the name change, I had no intent to deceive the United States Senate. During my discussions with Mr. Mahoney and my limited contacts with Senator Durenberger's staff regarding the name change, I was not made aware of any facts or intentions that led me to believe that the name change was intended to deceive the United States Senate or to obtain reimbursements for Senator Durenberger to which he was not legally entitled.

(5) See Durenberger Ex. 14, ¶7: Affidavit of Michael Mahoney.

(6) See Durenberger Ex. 76: February 5, 1986 letter from Senator Durenberger to Wilson Abney concerning the blind trust.

E. RULES COMMITTEE DECISION

- The decision of the Senate Rules Committee was contrary to the advice the Senator had received from Messrs. Johnson and Mahoney and at odds with the advice that, according to Ms. Krage, she received from the staffs of the Rules Committee and this Committee. Nonetheless, as he had promised to do, Senator Durenberger complied with this opinion and has repaid \$11,005.00 to the Senate, plus \$3,386.00 in interest.

See Durenberger Ex. 4, ¶4: Affidavit of Lori Krage Edstrom; Durenberger Ex. 9, ¶6: Affidavit of Randall Johnson; Durenberger Ex. 14, ¶14: Affidavit of Michael Mahoney.

F. SALE TO ISC AND RELATED LEGAL ADVICE

- The Senator's lawyer, Mr. Mahoney, the trustee of the blind trust, had responsibility for the condominium's sale to Paul Overgaard's company, ISC.

See Durenberger Ex. 14, ¶¶2, 15-17: Affidavit of Michael Mahoney.

- The evidence shows that, when the partnership was being dissolved and despite a contrary conclusion by a lawyer in his office, Mr. Mahoney advised Senator Durenberger that, to ensure the propriety of future reimbursements, he should sell the condominium and rent it back. Mr. Mahoney's sworn testimony is that at no time did he tell the Senator that reimbursements for rent paid to the partnership had been improper.

(1) Durenberger Ex. 14, ¶¶ 13-14: Affidavit of Michael Mahoney.

We were asked by someone on Senator Durenberger's staff what effect Mr. Scherer's leaving the partnership would have on the Senator's ability to claim reimbursement. I asked a lawyer in our office, Jeff Robbins, to look at that question. He concluded that Mr. Scherer's leaving would have no effect. He summarized his findings in a memorandum.

I informed Senator Durenberger's office of Mr. Robbins' conclusion, but I also emphasized the limited nature of the issue, and that we had been unable to find support for the underlying assumption that reimbursement under the partnership was proper. Given this uncertainty, I advised the Senator that he could transfer the condominium to a third person and lease it back if

he wished to continue receiving Senate reimbursement for official business stays there.

(2) Deposition of Michael Mahoney, p. 205, lines 9-15.

Q. So, in response to Mr. Kelley's request, you or members of your firm did work and decided that you could not opine that the previous requests for reimbursement by the Senator were proper?

A. I think that is fair, yes.

Q. Did you further opine that they were improper?

A. No, ma'am, we did not.

(3) See also Deposition of Michael Mahoney, p. 193, line 7 - p. 194, line 7.

- The sale of condominium no. 603 to ISC was made effective April 1, 1987. Sworn statements indicate that an oral purchase agreement had been reached earlier, although the sale documents were prepared and executed much later.

(1) Durenberger Ex. 15, ¶¶4, 6-7: Affidavit of Paul Overgaard.

Serious discussion of the purchase of the condominium by my company, ISC, took place in the latter part of 1986. Most of the discussion as to the details of the transaction was with Michael Mahoney. I believed I reached an agreement to purchase the property in late 1986 or early 1987. . .

Initially, it was intended that the effective date of our agreement would be January 1, 1987. But Mr. Mahoney was slow to dissolve the partnership, and reimbursement for rents paid to the partnership continued through March. As a result, the operational date of the purchase was moved back to April 1, 1987.

Mr. Mahoney was extremely slow in preparing the necessary documents for the condominium sale. I received the first drafts in August 1987. The final paperwork was dated to reflect the April 1, 1987 operational date of my agreement with Senator Durenberger.

(2) Durenberger Ex. 14, ¶¶15-16: Affidavit of Michael Mahoney.

To the best of my recollection, I had discussions with Mr. Overgaard and the Senator during late 1986 and early 1987, at which time a sale and leaseback agreement was reached.

Once the agreement had been reached, I naturally turned my attention to other matters. Some time later, we drafted documents memorializing the sale and lease-back agreement.

(3) Durenberger Ex. 11, ¶11: Affidavit of Douglas Kelley.

I believe that in late 1986 or early 1987 Senator Durenberger reached an oral agreement with Paul Overgaard regarding the purchase of condominium no. 603. The paperwork was not completed at the time the agreement was reached. The sale to Mr. Overgaard's company, Independent Service Company, was made effective April 1, 1987.

G. PRECAUTIONS REGARDING REIMBURSEMENT REQUESTS FOR RENTS PAID ISC

- The Senator did not submit a request for reimbursement for rents paid to ISC until Doug Kelley, his Administrative Assistant, concluded that the effective date of the sale was clearly established.

(1) Durenberger Ex. 11, ¶¶12-13: Affidavit of Douglas Kelley.

The delay in submitting bills for condominium rents to the Senate for the period April-October

1987 was primarily my responsibility. I told Senator Durenberger that I would not submit reimbursement vouchers for official business stays in the condominium until the effective date of the transaction was clear.

When I was satisfied as to the date the sale to Mr. Overgaard's company was effective, I instructed Heidi Shaw to submit the appropriate rental bills and reimbursement vouchers.

(2) Durenberger Ex. 23, ¶¶5-6: Affidavit of Heidi Shaw.

I routinely reviewed the dates of the Senator's condominium stays with Doug Kelley. At some time in 1987, he instructed me not to submit vouchers for rentals after March 1987. I understood that the reason for this was that he wanted to ensure that the documents relating to a sale to ISC, a company owned by Paul Overgaard, were in order before the Senator sought reimbursements. Around the end of 1987, Mr. Kelley directed me to submit vouchers for ISC rentals during the April-October period.

Subsequently, I returned to my usual procedures and provided dates of the Senator's condominium stays to ISC at the end of each month, as I had to the partnership's bookkeeper. . . .

H. FINALITY OF SALE TO ISC

- Despite Mr. Mahoney's delay in completing the sale, sworn statements and other evidence show that the Senator and Mr. Overgaard believed that the transaction was final and acted accordingly.

(1) Durenberger Ex. 15, ¶11: Affidavit of Paul Overgaard.

ISC's purchase of condominium no. 603 was a legitimate transaction, not a sham. A down payment was made, Senator Durenberger paid rents,

and I pay expenses relating to the condominium. There was an embarrassing looseness in the procedure, but the agreement between Senator Durenberger and me was clear to me.

(2) Durenberger Ex. 87: January 11, 1989 letter from Paul Overgaard to Senator Durenberger, p. 1.

It is now nearly three years^{18/} since we entered into an agreement that Independent Service Company would buy your condominium unit. ISC made the-agreed-to [sic] payments, executed the contracts provided and assumed payments to the bank, management company for monthly service and payment of taxes. . . .

(3) Durenberger Ex. 11, ¶14: Affidavit of Douglas Kelley.

In my opinion, the sale to Paul Overgaard's company was a legitimate transaction, and not a sham. Mr. Overgaard made a down payment on the property and paid expenses connected with it; Senator Durenberger paid rent to ISC. I would not have involved myself in any transaction that was not appropriate according to Senate rules.

- There was no legal obligation requiring Mr. Overgaard to return the condominium to the Senator, despite Mr. Overgaard's offer to do so after he became dismayed at Mr. Mahoney's failure to complete the transaction.

Durenberger Ex. 15, ¶10: Affidavit of Paul Overgaard.

I became so frustrated with the deal that I even offered to reverse the transaction with Senator Durenberger. Although we had informal discussions about the possibility of his buying the condominium back from me, I was never legally obligated to transfer it back to him.

^{18/} Mr. Overgaard meant two years.

- While the sale to ISC was handled in sloppy fashion, the evidence shows that beneficial title to the property passed to Mr. Overgaard.

(1) Durenberger Ex. 14, ¶17: Affidavit of Michael Mahoney.

It was my understanding that the nature of the agreement was that of a contract for deed, where the sale was conditional upon completion of the contract terms, i.e. a down payment, payment of a note given the Senator, and Mr. Overgaard's (or his company's) assumption of the existing mortgage. Until Mr. Overgaard or his company fulfilled these terms, Senator Durenberger could refuse to give a deed, although he could deliver a deed if he chose to. Nevertheless, under this arrangement, Mr. Overgaard/ISC was treated as owner of the condominium from the date of agreement. He made the down payment, paid related bills, and received rents. He had all rights in the condominium with respect to third parties, except that, if he sold the unit, the buyer would assume only Mr. Overgaard's/ISC's conditional interest.

(2) See also Durenberger Ex. 15, ¶5: Affidavit of Paul Overgaard.

I. MINNESOTA LAW ON EFFECTIVE DATE OF SALE

- Under Minnesota law, a real estate transaction may be made effective at a date earlier than the date the documents are executed, if the parties so intend.

See Travelers Ins. Co. v. Horseshoe Lake Farms, Inc., CX-89-1748 (Minn. Ct. App., May 29, 1990) (Attachment 1) which held that a transfer of property from Horseshoe Farms to Travelers was valid as of August 1, 1983, even though sale documents, which were back dated to the August 1 effective date, were not executed until December 14, 1983.

"In this case, the trial court concluded that the time a deed takes effect is a factual question for the jury. In reaching this conclusion, the court relied on First Minneapolis Trust Co. v. Lancaster Corp., 185 Minn. 121, 240 N.W. 459 (1931), and Kammrath v. Kidd, 89 Minn. 380, 382, 95 N.W. 213, 214 (1903). In both of those cases, the Minnesota Supreme Court held that the intent of the parties may be considered in determining when a deed takes effect. Accordingly, here the trial court properly instructed the jury to consider the intent of the parties in determining when Travelers acquired or began to hold the property. . . .

The decision to back date all the documents regarding the transfer to August 1, 1983, was a fully informed, bargained for, consensual decision^{19/} by all parties." (Emphasis added.)

**CONCLUSION: THE SANCTION AND LANGUAGE
SPECIAL COUNSEL PROPOSES ARE FAR TOO SEVERE**

We respectfully submit that the harsh sanction and language Special Counsel recommends would be appropriate only (1) if the evidence clearly and convincingly shows that Senator Durenberger acted with intent to violate laws or

^{19/} Special Counsel has cited no authority to the contrary. Indeed, with the exception of the issue regarding speaking in the Capitol Buildings, we have received no written analysis from Special Counsel as to the legal issues involved in the possible violations before the Committee.

Senate rules, and (2) if important laws or rules clearly have been violated.^{20/} As to (1), there can be no finding that Senator Durenberger intended to violate any legal standards because the sworn evidence overwhelmingly shows his good faith. Indeed, Special Counsel himself expressly has declined to conclude that Senator Durenberger acted with specific intent to violate any laws.

As to (2), it is difficult to find such clear violations of law or rules. Despite the haphazard way in which the Piranha contract was implemented, Senator Durenberger was performing a continuing service for Piranha -- making appearances for which it was compensated and assisting to establish it as a publisher of political and historical books. Senator Durenberger was not compensated separately for any Piranha appearance. To use the FEC's

^{20/} Special Counsel several times has stressed that this is an "ethics case," as opposed to "a technical legal case." Statement of Special Counsel, unofficial transcript compiled by Federal Information Systems Corp., for June 12, 1990 (at p. 34). See also transcript for June 13, 1990 (at pp. 27, 28). But surely the Committee must find a clear violation of important laws or rules, along with the intent to do so, before it imposes a harsh sanction. The mere claim that conduct is "unethical" imposes a standard much too vague to be enforced in this period of our history where the ethical norms that apply to public officials appear to be both uncertain and shifting.

language in the Congresswoman Jordan case, he was not compensated "for a single event or transaction and under circumstances which do not imply a continuing relationship between the parties for similar services." FEC Advisory Opinion No. 1975-46. While the Committee may disagree with this result on policy grounds, under the Jordan case the payments as a matter of law must be considered a stipend, not honoraria. The honorarium rules thus were not violated.

What in essence we have here is conduct that may have given the impression that the honorarium rules were violated, even though as a technical legal matter they were not. The Committee may find that some sanction is appropriate for creating an appearance that reflects upon the Senate, but denouncement is too onerous.

* * *

The Senate rules relating to reimbursements were, and yet are, most imprecise. They read in pertinent part:

Reimbursable Expenses:

Traveling expenses which will be reimbursed are confined to those expenses essential to the transaction of the official

business while away from the official station or post of duty.

The official duty station of all Senate Members and employees shall be considered to be the metropolitan area of Washington, D.C. . . . The official duty station of Senators shall be considered to be their residence cities in their home States during adjournment sine die or the adjournment period authorized in odd-numbered years by Public Law 91-510.^{21/}

Until the Senate Rules Committee decision last January, it was not established that "residence city" meant a Member's usual place of residence, not his or her legal or voting residence. Indeed, two attorneys -- Messrs. Johnson and Mahoney -- advised Senator Durenberger wrongly in this regard.^{22/} Moreover, the Senate Disbursing Office never suggested there was a problem, even though the invoices Senator Durenberger submitted with his reimbursement requests made it obvious that he stayed in the same condominium whenever he was in Minneapolis on official business.

^{21/} Senate Travel Regulations, I. General Regulations, (C), p. II-52.

^{22/} This result essentially means that a Senator from Minnesota who returns to his home state during sine die adjournment and the August recess for official business reasons must pay his own expenses because he usually will stay in the Twin Cities area.

There is still an open question whether it is improper to seek reimbursement for rent paid to an entity in which a Member has an interest. Mr. Johnson and, according to Ms. Krage's sworn statement, the staffs of the Rules Committee and this Committee found no problem with this. Special Counsel has yet to cite publicly any Senate rule or ruling establishing that reimbursements in this context are inappropriate.

Again, the Senator's conduct may have given the impression that rules have been violated in this circumstance, although as a legal matter that is not clear. But surely any sanction the Committee may impose for creating an appearance that reflects on the Senate should be less than that applied where a very clear violation of law is present.

In an attempt to shore up his finding of unethical conduct, Special Counsel essentially contends that both the transfer to the partnership and the sale to ISC were not legitimate transactions. But his assertions are flatly contradicted by the sworn statements of the participants. In light of this sworn testimony -- and the Minnesota precedent allowing a real estate transaction to be made effective prior to the date the sale documents are prepared,

where the parties so intend -- this Committee cannot conclude that the evidence clearly and convincingly establishes that the transactions were illegitimate.

As demonstrated above, the "clear and convincing evidence standard" is a stringent test -- closely akin to a "beyond a reasonable doubt" standard. It cannot be met here in this regard.

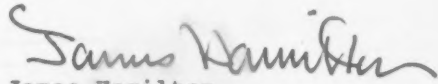
In these circumstances, the sanction Special Counsel recommends -- denouncement -- and the characterizations he uses to describe Senator Durenberger's conduct -- reprehensible and bringing the Senate into dishonor and disrepute -- simply are not appropriate. We urge this Committee to reject these overly severe and stigmatizing characterizations.

We do not, however, seek exoneration by the Committee. The Senator made serious errors in judgment and, in the specific instances we discussed at the hearing, he violated rules. The Senator has accepted full responsibility for his actions and expressed his deep regret.

We thus ask that the Committee recommend to the Senate a sanction that is consistent with Senator Durenberger's actual conduct and intent, and that recognizes

the historical precedents and his conscientious service over an eleven-year period to the Senate and the people of Minnesota. As stated above, we believe that a strong reprimand is the appropriate sanction.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "James Hamilton". The signature is fluid and cursive, with a large initial "J" and a stylized "H".

James Hamilton
Bert J. McKasy
Mary C. Albert
Karen A. Tomcala

Counsel for Senator David F.
Durenberger

ATTACHMENT 1

ATTACHMENT 1

PAGE 2

1ST CASE of Level 1 printed in FULL format.

Travelers Insurance Company, Respondent, v.
 Horseshoe Lake Farms, Inc., Defendant, Frances
 Gerzewski, individually and as personal representative of
 the Estate of Adrian Gerzewski, Appellant, Raymond Campbell,
 et al., Respondents, Jack W. Hanson, Respondent, R. D.
 Offutt Company, Respondent

No. CX-89-1748

Court of Appeals of Minnesota

1990 Minn. App. LEXIS 548

May 22, 1990, Decided

PRIOR HISTORY: [*1]

Appeal from District Court, Todd County; Hon. Paul E. Flora, Judge.

DISPOSITION: Affirmed.

SYLLABUS: SYLLABUS

1. Intent of the parties in determining when real property is "acquired" or "held" pursuant to Minn. Stat. § 500.24, subd. 6 (1988) is proper and relevant for the factfinder to consider.

2. A special verdict will not be overturned unless manifestly contrary to the evidence.

COUNSEL: Raymond A. Haik, Robert C. Moilanen, Linda S. Friedner, Popham, Haik, Schnobrich & Kaufman, Ltd., Minneapolis, Minnesota, for appellant.

Dennis J. Neeser, Willmar, Minnesota, (Attorney for Travelers Ins. Co.); John D. Quinlivan, Quinlivan, Sherwood, Spellacy & Tarvestad, St. Cloud, Minnesota, (Attorney for Raymond Campbell, et al.); Pro Se, Minneapolis, Minnesota, (for Jack W. Hanson); MacLay R. Hyde, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, Minnesota, (Attorney R. D. Offutt Company), for respondent.

JUDGES: Considered, and decided by Lansing, Presiding Judge, Parker, Judge, and Randall, Judge.

OPINIONBY: RANDALL

OPINION: OPINION

Appellant Frances Gerzewski challenges the trial court's jury instruction that intent of the parties may be considered in determining when property is acquired, and the trial court's refusal to instruct the jury on [*2] the doctrine of waiver. In addition, respondent Travelers Insurance Company (Travelers) challenges the jury's finding that it failed to make a proper mailing of the notice of the right of first refusal. We affirm on all issues.

FACTS

Horseshoe Lake Farms, Inc. (HLF) was incorporated in Minnesota in 1973 with seven shareholders, including Adrian Gerszewski and respondents Raymond Campbell, George Campbell, Edward Campbell (Campbells), and Jack Hanson. In 1974, HLF purchased approximately 2104 acres of agricultural land located in Todd County (the property). In the course of its operations HLF incurred a number of substantial debts. By 1983, HLF's debt to Travelers, including a mortgage on 1165 acres of the property, exceeded \$ 3.2 million. These debts were personally guaranteed by HLF's shareholders.

HLF was experiencing financial difficulties. In the spring of 1983, HLF agreed to give Travelers a deed in lieu of foreclosure in exchange for cancellation of HLF's debt to Travelers, the release of the mortgage, and the release of the shareholders from personal liability. Travelers also agreed to lease the land back to HLF from August 1, 1983, to December 1, 1985.

On November 25, 1983, [*3] the HLF shareholders, Adrian Gerszewski, Hanson, and the Campbells, executed a corporate resolution authorizing the execution of documents evidencing the agreement "made and entered into as of the 1st day of August, 1983" between HLF and Travelers. On December 14, 1983, the deed to the property was delivered and the Agreement (deed in lieu of foreclosure), Lease Agreement, and General Warranty Deed were executed by the parties. By agreement of all parties, each of these documents was back dated to August 1, 1983. Also on December 14, 1983, HLF paid to Travelers rent on the property for the period of August through December 1983, pursuant to the Lease Agreement.

Travelers released HLF from its debt obligations, including the mortgage and the personal guaranties of its shareholders, as of August 1, 1983. In addition, Travelers' release of the liens on the property allowed HLF to enter into a purchase agreement on November 4, 1983, to sell 817 acres of land. HLF used the proceeds of this sale to pay other outstanding debts.

In 1983, HLF subleased the property to Adrian Gerszewski. When Travelers increased the rent in 1985, Gerszewski refused to pay the increased rent, and the land [*4] was subsequently leased to R.D. Offutt Company (Offutt) in the spring of 1986. Offutt continued to rent the property through the time of trial in 1989.

In 1988, Offutt and Travelers negotiated a sale of the property to Offutt. Offutt signed and returned the contract to Travelers on July 1, 1988. This contract was expressly conditioned on the former owner not exercising a right of first refusal under Minn. Stat. § 500.24. Travelers' regional director signed and dated the form contract of sale on August 4, 1988. Travelers received Offutt's commitment letter securing financing on August 26, 1988.

On June 27, 1988, Travelers mailed a notice of offer for sale to HLF. This notice did not comply with the statutory form mandated by Minn. Stat. § 500.24, subd. 7. The notice was sent to Hanson who was HLF's registered agent. Hanson notified Travelers that he was no longer an appropriate party to receive the notice, and requested that notices be sent to the HLF shareholders. Travelers subsequently placed a memorandum in its file acknowledging that notices of the right of first refusal should be sent to Gerszewski and the Campbells. On June 28, 1988, Travelers mailed a notice of offer for sale [*5] to Gerszewski and to the Campbells.

On August 30, 1988, after the contract to sell the property to Offutt had been accepted by Travelers, a Notice to Buy Agricultural Land was sent to Hanson. It was not until September 20, 1988, that Gerszewski received Travelers' Notice to Buy Agricultural Land. This notice stated in part that:

UNDER MINNESOTA STATUTES, SECTION 500.24, SUBDIVISION 6 AN OFFER FROM THE TRAVELERS INSURANCE COMPANY MUST BE MADE TO YOU AT A PRICE NO HIGHER THAN THE HIGHEST OFFER MADE BY ANOTHER PARTY. * * * THE PRICE IS OFFERED ON THE FOLLOWING TERMS: CASH IN THE AMOUNT OF \$ 1,055,107.43.

After Gerszewski learned that HLF and the other shareholders were not interested in purchasing the property, appellant sought financing and legal counsel in an attempt to exercise the statutory right of first refusal. Appellant accepted Travelers' Offer to Buy Agricultural Land but failed to perform according to the terms of the offer.

On October 17, 1988, Travelers commenced a declaratory judgment action seeking a determination that Minn. Stat. § 500.24, subds. 6 and 7, did not apply because any actual sale would occur after Travelers had held the property over five years, and a [*6] declaration that it had complied with the statutory notice provisions of section 500.24, subds. 6 and 7. Gerszewski counterclaimed alleging, inter alia, that Travelers waived its right to assert that it need not comply with the statute.

The trial court bifurcated the action because a variety of other claims had been raised by the parties. n1 The issues relating to Minn. Stat. § 500.24, and the right of Travelers to sell the property were tried to a jury. Gerszewski objected to the court's instruction permitting the jury to consider the intent of the parties in deciding when Travelers acquired the property. Gerszewski also objected to the court's refusal to instruct the jury on the doctrine of waiver.

-----Footnotes-----

n1 The remaining issues to be tried concern the operation and ownership of HLF. Gerszewski and Offutt have asserted a number of crossclaims and counterclaims which raise issues not involving Travelers. Because these claims are distinct from the issues concerning Travelers' right to sell the property, the trial court bifurcated the trial.

-----End Footnotes-----

[*7]

The jury returned a special verdict, finding: (1) Travelers acquired or began to hold the property on August 1, 1983; (2) Travelers did not make proper mailing of the right of first refusal; (3) The notice of right of first refusal prepared by Travelers was proper; (4) Gerszewski did comply with the statute when accepting the offer to purchase; and (5) Gerszewski did not perform according to the terms of the offer. In its order for judgment, the trial court adopted the jury's special verdict as its findings of fact. In its amended order for judgment, the trial court concluded that Travelers could sell the property n2 and made its order appealable pursuant to Minn. R. Civ. P. 54.02.

-----Footnotes-----

n2 Travelers subsequently sold the property to Offutt in accordance with the contract of August 1988.

-----End Footnotes-----

ISSUES

1. Did the trial court's jury instructions accurately reflect the law on the transfer of real property?

2. Was the jury's finding that Travelers failed to make a proper mailing of the notice of the right of first refusal contrary [*8] to the evidence?

ANALYSIS

The primary dispute on appeal concerns the date that Travelers is deemed to have acquired the property under Minn. Stat. § 500.24, subd. 6. This date determines the expiration of the five year period in which the former owner has a statutory right of first refusal. The agreement to transfer the property to Travelers and the deed to the property were not executed and delivered until December 14, 1983. All parties agreed, however, that the written agreements, deed, and corporate resolution authorizing the transaction were to be effective as of August 1, 1983, and each of these documents was back dated to August 1, 1983. Appellant argues that the expiration of the period in which Travelers was required to provide the former owner with a notice of right of first refusal was artificially shortened by allowing the jury to consider the intent of the parties as to when Travelers actually acquired the property. n3 Appellant argues vigorously that December 14, 1983, is the date of acquisition as a matter of law. We disagree and find that the jury was properly allowed to consider intent, and that the record supports the jury's finding.

-----Footnotes-----

n3 Simply put, if the month of acquisition is December, a five-year statute is relevant and benefits appellant. If the month of acquisition is August, the five-year statute in issue is not applicable, and that benefits respondent.

-----End Footnotes-----

[*9]

I.

Jury Instructions

Appellant challenges the trial court's instruction to the jury that intent of the parties may be considered in determining when Travelers acquired the property, and the failure of the trial court to instruct the jury on the doctrine of waiver.

Instructions to the jury must as a whole convey a clear and correct understanding of the law. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). The first instruction appellant challenges is that which permitted the jury to consider the parties' intent. The trial court instructed the jury:

You must decide when Travelers acquired or began to hold the property in

question. This means that you must determine when the parties, Travelers and Horseshoe Lake Farms, intended the ownership of the land to change; at the time that they agreed to the Deed in Lieu of Foreclosure arrangement, at the time of the closing or at some other time. In determining the parties' intent, you may consider the relevant writings, actions and words of the parties.

Minn. Stat. § 500.24, subd. 6(a) provides that a corporation may not sell agricultural land that was acquired by enforcing a debt against land, including accepting a deed in lieu [*10] of foreclosure, before offering or making a good faith effort to offer the land for sale to the immediately preceding former owner at a price no higher than the highest price offered by a third party that is acceptable to the seller. This statutory right of first refusal applies to the seller "for five years after the agricultural land is acquired * * *." Minn. Stat. § 500.24, subd. 6(e) (emphasis added). The right of first refusal need not be given when the seller has held the property for five years or longer. See Minn. Stat. § 500.24, subd. 6(g). Thus, the date that the property was acquired or first held must be determined to establish whether the former owner is entitled to the right of first refusal. The primary question raised by this appeal is whether intent may be considered in determining when a party acquires or begins to hold property under Minn. Stat. § 500.24, subd. 6.

The meaning of "acquired" under section 500.24, subd. 6 was considered by this court in *Harbal v. Federal Land Bank of St. Paul*, 449 N.W.2d 442 (Minn. App. 1989), pet. for rev. denied (Minn. Feb. 21, 1990). In *Harbal*, the mortgagors of agricultural land brought an action against the [*11] mortgagee, Federal Land Bank, to recover for violation of the statutory right of first refusal. Federal Land Bank had foreclosed on the mortgaged property and subsequently received a sheriff's certificate for the property. Federal Land Bank argued that as a holder of a sheriff's certificate, title to the property does not vest until the statutory redemption period has run. Since Federal Land Bank had assigned the sheriff's certificate to a third party before the redemption period had run, it argued that title could never have vested, and thus it had never "acquired" the property within the meaning of Minn. Stat. § 500.24, subd. 6.

This court rejected that technical construction as inconsistent with the act's purpose and determined that the legislature had

clearly expressed [a] preference that foreclosed property remain in the possession of its former owner whenever possible. If the term "acquire" were interpreted to mean when title actually vests in the lending corporation, the right of first refusal would be denied to the former owner during the redemption period following the foreclosure sale. * * * The remedial purposes of the statute will be better served by a broader construction [*12] of the term "acquire" to include the interests acquired on the date of the sheriff's sale.

Id. at 447. Thus, the court applied an expansive reading of the statute, refusing to limit "acquire" to mean only when title actually vests.

In this case, the trial court concluded that the time a deed takes effect is a factual question for the jury. In reaching this conclusion, the court relied on *First Minneapolis Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 240 N.W. 459 (1931), and *Kamrath v. Kidd*, 89 Minn. 380, 382, 95 N.W. 213, 214 (1903). In both of those cases, the Minnesota Supreme Court held that the intent of the parties may be considered in determining when a deed takes effect.

Accordingly, here the trial court properly instructed the jury to consider the intent of the parties in determining when Travelers acquired or began to hold the property.

Appellant argues that the jury should have considered only the actual delivery of the deed on December 14 to determine when Travelers acquired the property. This argument is not persuasive. On these facts, the jury was entitled to find that the proper focus was not December when legal title technically passed, but rather August [*13] pursuant to the clear expression of the parties. We affirm the jury's analysis that the property was "acquired" or "held" under Minn. Stat. § 500.24, subd. 6, as of August 1, 1983. Travelers was, therefore, not required to give appellant the statutory right of first refusal as the five year period had expired.

Appellant also argues that policy considerations mandate a liberal construction of the terms "acquire" and "held" to grant a family farmer (appellant) the right to retain or repurchase a family farm. This argument is misplaced. First of all, appellant is not a member of the class of persons the legislature sought to protect in enacting the statute. Both appellant and respondent Offutt are extremely large commercial potato operations, not family farms. Appellant is a North Dakota business, owning land in both Minnesota and North Dakota. It is questionable whether the Minnesota Family Farm Act was intended to include large out-of-state commercial operations. However, we do not need to consider this question. Even assuming that appellant may be protected by the Act, the five year time period within which a previous owner would be entitled to notice of the right of first refusal [*14] had expired at the time Travelers sold the land to Offutt.

The decision to back date all the documents regarding the transfer to August 1, 1983, was a fully informed, bargained for, consensual decision by all parties. Adrian Gerszewski himself signed the corporate resolution authorizing August 1, 1983, as the effective date of the transfer. Appellant enjoyed the benefits of the agreement to back date the transaction. The deed in lieu of foreclosure shielded him from a potential deficiency judgment of several hundred thousand dollars, and the release of the mortgage allowed HLF to sell 817 acres of land and use the proceeds to pay other outstanding debts. Both Travelers and HLF accepted the benefits of the transfer of the property as of August 1, 1983, and the trial court properly instructed the jury on the doctrine of estoppel:

A person who knowingly accepts the benefits of a transaction may not thereafter deny the terms and the conditions of the transaction and is thereafter estopped from denying the terms and the conditions of the transaction. Estoppel precludes a party from asserting rights which it would otherwise have.

Appellant may not accept the advantages of the agreement [*15] and now seek to disclaim that agreement. The jury's finding that Travelers "acquired" the property on August 1, 1983, is supported by the record.

Appellant has also challenged the refusal of the trial court to instruct the jury on the doctrine of waiver. Appellant contends that Travelers waived its right to claim that the statute does not apply because Travelers took steps to comply with the statute. Gerszewski argues that by expressly conditioning the contract to sell the property to Offutt on the former owner's right of first refusal, and sending the shareholders the notice required by Minn. Stat. § 500.24, subds. 6 and 7, Travelers cannot now claim that the statute does not

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apply. We disagree.

The mere fact that Travelers prudently attempted to put HLF and its shareholders on notice of a possible statutory right does not mean that Travelers waived its contention that the right of first refusal no longer existed because the five year period had expired. Travelers took precautionary measures in case the statute did apply; it never gave any indication that it was waiving the defense that the statute no longer applied. The mere sending of a notice advising a party of the possible existence [*16] of a legal right does not create a statutory right. See *Rutherford v. County of Kandihohi*, 449 N.W.2d 457, 461 (Minn. App. 1989), pet. for rev. denied (Minn. Feb. 28, 1990). See also *Krueger v. Washington Federal Savings Bank of Montevideo*, 406 N.W.2d 543 (Minn. App. 1987). The trial court's refusal to provide an instruction on waiver was consistent with the law.

Finally, although not necessary for our decision, respondent's contention that the statute may not even be applicable to appellant has merit. The plain language of the statute states that the right of first refusal must be provided to the "immediately preceding former owner." See Minn. Stat. § 500.24, subd. 6(b). As respondent correctly points out, the previous owner of this property was HLF. Appellant was only a minority shareholder of HLF. Arguendo, if the statute is applicable, for reasons discussed above, we find for respondent.

II.

Sufficiency of Statutory Notice

Travelers has challenged the jury's finding that it failed to make a proper mailing of the notice of the right of first refusal. A jury's answer to a special verdict question will be set aside only when it is palpably contrary to the evidence. [*17] *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984). If the jury's special verdict finding can be reconciled on any theory, the verdict will not be disturbed. *Id.*

Travelers argues that service on Hanson was proper as he was the registered agent of HLF. Travelers contends that service on a corporation may be made by delivering a copy of the notice to the corporation's registered agent or an officer of the corporation. See Minn. R. Civ. P. 4.03(c). It also contends that the statute only requires a good faith effort to offer the land for sale to the former owner, and that mailing notice to the former owner's last known address establishes a good faith offer. See Minn. Stat. § 500.24, subds. 6(a) and 6(f).

Travelers relies on the testimony of Jack Hanson that, as of August 1988, the Secretary of State's records would indicate that Hanson was the registered agent for HLF. Travelers does not contend that it sent the notice to Hanson because it actually relied on the records of the Secretary of State listing Hanson as the registered agent. Rather, Travelers admits that it sent the notices to Hanson because he was the party who had negotiated the deed in lieu of [*18] foreclosure transaction with Travelers.

The record supports the jury's conclusion that Travelers failed to make a proper mailing of the notice of the right of first refusal. The first notice sent to Hanson on June 27, 1988, and to Gerszewski on June 28, 1988, did not comply with the requirements of Minn. Stat. § 500.24, subd. 7. In addition, Travelers learned that Hanson was no longer the proper party to receive the

notices, and generated an internal memo indicating that all future notices should be sent to Gerszewski and the other HLF shareholders. Travelers did send the correct form of the notice on August 30, 1988, but mailed it to Hanson instead of to Gerszewski and the others. Hanson again notified Travelers that notices should be sent to Gerszewski and the others. It was not until September 20, 1988, that Gerszewski received notice in the proper form from Travelers. While Travelers also contends that its actions constituted a good faith effort to provide notice, there is sufficient evidence to support the jury's finding that Travelers failed to make proper mailing of the notice of the right of first refusal.

DECISION

The trial court properly instructed the jury that intent of [*19] the parties may be considered in determining when property is "acquired" or "held" under Minn. Stat. § 500.24, subd. 6. The trial court's refusal to instruct the jury on the doctrine of waiver was proper. Thus, the jury's verdict that Travelers acquired the property on August 1, 1983, was proper, is supported by the record, and was not influenced by an error of law.

There is support in the record for the finding that Travelers failed to make a proper mailing of the notice of right of first refusal.

ATTACHMENT 2

DURENBERGER EXHIBIT 113

ATTACHMENT 2AFFIDAVIT OF MARSHALL HOUTS

County of Orange)
): SS
 State of California)

I, MARSHALL HOUTS, being first duly sworn, depose and state:

EFFORT TO PREVENT MISCARRIAGE OF JUSTICE

On June 12, 1990, on C-SPAN, I watched Special Counsel's opening statement in the Senate Ethics Committee proceedings involving Senator Dave Durenberger. The following day, I watched Counsel's rebuttal after Senator Durenberger's own speech.

I am concerned about Special Counsel's substantial misrepresentations of the book publishing and book promotion business, and volunteer this affidavit in an effort to prevent a miscarriage of justice if Counsel's erroneous allegations are accepted at face value.

40 YEARS' EXPERIENCE IN BOOK PUBLISHING AND BOOK PROMOTIONS

I have worked in the book publishing business for almost 40 years as a publisher, editor and author, writing 44 books under my own name; creating *Trauma*, the bimonthly, hard cover, medico-legal periodical with the largest circulation of any publication of its kind in the world; recruiting authors; and working with some of the country's top literary and dramatic agents.

Since 1971, my books published by Matthew Bender & Company alone have grossed some \$25 million. Before that time, my books with Bender and afterwards with other companies have grossed an additional \$5 million.

Matthew Bender is the largest publisher of legal texts in the world; and some of my books have been published by such leading trade book (non-text, non-technical) houses as William Morrow & Co., Coward-McCann, Cowles Book Company and Souvenir Press (London).

I have also owned two small publishing houses of my own; and have considerable experience working with authors in all facets of the publishing business, including publisher-author contracts.

PUBLISHER-AUTHOR CONTRACTS

Publisher-author contracts can take any form the parties work out to their mutual satisfaction.

Undoubtedly, the most common is a royalty contract whereby the publisher agrees to pay the author an amount equal to a percentage of the retail sales of the book. This percentage varies with the stature of the writer and the type of book which determine the market potential.

A royalty contract may or may not include an advance against royalties.

FIXED FEE ARRANGEMENT

A publisher may also compensate the author on a *fixed fee* basis. I have done work for fixed fees for Matthew Bender & Company, as well as for William Morrow, and have paid dozens of authors fixed fees for their writings for me.

Some of my contracts have even given authors advance permissions to republish their works in other publications after our initial use of their materials, even though we hold the registered copyright.

In short, simply because a publishing contract does not fit the usual royalty contract mold does not in any way make it an unreasonable or improper agreement.

BOOK PROMOTION ROUTINES

With 50,000 new trade books published each year, the publisher's great problem is to capture enough of the book buying market to at least recoup his publishing costs. Every publisher is always on the look-out for novel sales gimmicks to market any book.

Major publishers do not approach books as individual products. Rather, they try to develop name recognition of the author. In effect, they sell the author far more than they sell his separate books.

ERLE STANLEY GARDNER'S THEORIES ON BOOK PROMOTIONS

I worked closely with Erle Stanley Gardner for 19 years, both as General Counsel to his *Court of Last Resort* and on the Perry Mason TV show. I accompanied him on a minimum of 50 "book promotion" speeches he made to live audiences all over the country. In all of these speeches, I never once heard him mention a single one of his books.

I can reproduce his philosophy on book promotion verbatim:

"It's arrogant enough for any person to think he can write a book others will pay good money to read. It would be a double insult to hear some author get up in front of an audience and plug his own book, telling people to rush out and buy it.

"I'll take my chances with the buying public by just showing up and talking about something of general interest, not about Gardner books, or how I write them. When they go to a book store later and see one of my books, they'll say, 'By golly, I heard that guy talk, and I liked him; so I'll sample his book. I don't really give a damn what the subject is, since I liked what the guy looked like and the way he talked!'"

MANY AUTHORS FOLLOW GARDNER'S PHILOSOPHY

Many of today's leading authors follow the Gardner philosophy on book promotions.

It is not necessary for them to wave their books in front of audiences and discuss them in detail. As a matter of fact, this could well turn off the audience. In their public appearances, authors promote themselves by getting their names before the public. Effective promotion of a specific book is, in effect, incidental, and requires this subtle approach.

(I speak, of course, of speeches before live audiences, not radio and TV book review shows).

AVAILABILITY OF BOOKS

Making books available for purchase at the site of an author's personal appearance or in book stores in the area is the burden of the publisher, and the frustration of all authors.

All the author can do is advise the publisher of his speaking engagements (exclusive of book promotion tours arranged by the publisher), and trust that the publisher will make books available. I think it safe to say that more often than not, the author arrives for his speaking engagement, and finds no books at the site, or even in the city.

PRE-PUBLICATION PROMOTION

Publishers dearly love any pre-publication coverage they can get; and major publishers pay out money for these activities. They want the public to get acquainted with the author, and incidentally learn that this particular author has something new in the pipeline to which they can look forward.

This pre-publication promotion comes in all hues, the author's name recognition most important of all; and the fact that an author accepts a speaking engagement before a book actually rolls off the presses is icing on the cake which publishers relish, and is not the least bit unusual.

PUBLISHER'S DEFICIENT PERFORMANCE IS NOT CHARGEABLE AGAINST AUTHOR

In many, many instances, publishers do not take advantage of sales promotion activities presented them by an author in the form of speaking engagements. They do not make books physically available, nor do they even have on-site brochures or order blanks.

This is particularly true of small publishers who do not have either the financial means or the know-how to market books. Many of them fail because of these two deficiencies.

A publisher's amateurish performance cannot be held against the author who does all he can to offer the publisher book promotional opportunities.

Marshall Houts
Marshall Houts

Subscribed and sworn to before me,
this 25th day of June, 1990.

B. B. B.
Notary Public

My Commission expires July 14, 1992

